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CASE AND COMMENT

CROWN PRIVILEGE—POLICE COMMUNICATIONS—METHOD OF CLAIM TO PRIVILEGE

Two reported rulings in the well-publicised proceedings in *Auten* v. *Rayner* [1958] 1 W.L.R. 1300 and *Auten* v. *Rayner No. 2* [1960] 2 W.L.R. 562 provide illustration of the workings of the English law of Crown privilege as established by *Duncan* v. *Cammell, Laird & Co.* [1942] A.C. 624. The first ruling held that a detective's reports to his superiors and some inter-police force communications were excluded from the court's consideration by the Home Secretary's declaration that such disclosure would not be in the public interest, despite the plaintiff's allegations of fraudulent conduct by the defendants. The plaintiff, arguing from the rules relating to claims of professional privilege (see *O'Rourke* v. *Darbishire* [1920] A.C. 581) contended that when a prima facie case of fraud is made out the usual rules of privilege are inoperative. And, in Lord Evershed's words, the court would therefore be competent to determine whether " the public interest, that is the interest of the department concerned as a department of State or its equivalent, outweighed the requirement of due administration." The Master of the Rolls rejected the argument, saying: " Where in an action between private individuals fraud is alleged, the parties concerned lose the benefit of their private right to privilege. But here there is no right which a private person can forfeit. It is a public right required and justified by the administration of public affairs."

Since the English law of Crown privilege appears to operate, adopting Wigmore's analysis of the exclusionary rules of evidence (see *Wigmore on Evidence*, vol. 8, s. 2175, 3rd ed., 1940), as a rule of absolute exclusion, rather than as a rule of conditional exclusion or evidentiary privilege, Lord Evershed's recognition of the inapplicability of the ordinary rules of evidentiary privilege is well

founded. The uniqueness of the rule in *Duncan's* case, noted by previous commentators (see, *e.g.*, J. E. S. Simon, " Evidence Excluded by Considerations of State Interest," [1955] C.L.J. 62), requires examination of the rationale of any rule applicable to evidentiary privilege in order to determine its possible relevance to claims of Crown privilege. In this instance, Lord Evershed's conclusion that fraudulent acts by the parties do not affect the issue of public interest which a Minister must determine when deciding whether to claim Crown privilege seems, with respect, to be sound.

The second ruling concerned another aspect of Crown privilege: the manner in which the claim to prevent disclosure is raised. In reference to entries in the detective's diaries the Home Secretary stated: " I have carefully considered the contents of the remaining entries in the said diaries, and I have formed the opinion that it would be injurious to the public interest if those entries which I have caused to be covered up with brown paper were to be disclosed, because they indicate or tend to identify the sources of information given in confidence for the purpose of a criminal investigation."

Relying upon dicta in the initial ruling (see [1958] 1 W.L.R. at p. 1310) the plaintiff contended that the Home Secretary's statement was a claim of privilege for a class of information, and that since evidence given in court revealed that some of the items withheld were not within the specified class, the court should examine the diaries to determine whether information which could not reveal confidential sources had been mistakenly withheld. Glyn-Jones J. held that the affidavit did not, in fact, invoke a " class privilege," but rather stated that disclosure of each entry covered with brown paper would be contrary to the public interest. Accordingly, under *Duncan's* case, the affidavit was binding on the court.

This holding is interesting not only as a judicial consideration of the grammatical distinction between a claim of Crown privilege for particular items in a group and a claim of Crown privilege for a class of information. The implication that if a claim of class privilege is based upon a rationale more specific than the public interest, the court may have power to examine the data in ruling on an allegation of over-inclusiveness may be of some use in future litigation. However, since a ministerial determination that disclosure would be " contrary to the public interest " retains its full vitality in cutting off judicial investigation, this less definite but most effective form of claiming Crown privilege leaves the executive with unimpaired power to block inquiry.

The second ruling dealt also with a claim raised orally in court by the Attorney-General to exclude evidence in the public interest.

In the sixth week of this extended litigation the plaintiff caused to be served upon a representative of the Director of Public Prosecutions a *subpoena duces tecum* ordering the production, *inter alia*, of the police reports held privileged in the earlier proceedings. The Attorney-General claimed Crown privilege on alternative grounds: first, that as the Minister of the Crown responsible for the acts of the Director of Public Prosecutions he could claim Crown privilege on the spot, either orally or in writing; and secondly, that although the Director of Public Prosecutions, rather than the detective, now held the documents, the previous finding that the documents were privileged from production in court was still applicable. The court upheld this claim, apparently on both grounds.

The court also held that the Attorney-General's oral claim of Crown privilege was sufficient to prevent judicial inquiry into items which had not previously been held privileged. Some of the documents sought by the *subpoena duces tecum* had not been considered in the earlier proceedings, and as to these Glyn-Jones J. stated: ". . . they are documents in respect of which the Attorney-General himself here and now claims Crown privilege in front of me, and I cannot go behind that claim." Accordingly, it appears that when the Attorney-General can be considered a responsible Minister, he can claim Crown privilege orally or in writing at the trial if the occasion demands: see *Broome* v. *Broome* [1955] P. 190 and comment in [1955] C.L.J. 62. Still, the requirement laid down in *Duncan's* case that ministers should give personal attention to all claims of Crown privilege would appear to allow the court to intervene if it feels that the Attorney-General is acting hastily.

It is significant that in *Auten's* case, as in the much discussed *Broome* v. *Broome* (above), Crown privilege was invoked although an evidentiary privilege was available. In *Auten's* case, as the Home Secretary's second affidavit indicates, the privilege protecting the identity of informants could have been pleaded to protect the detective's diary entries; the privilege protecting communications to marriage counsellors would have applied to much of the information involved in *Broome* v. *Broome*, as also in *Whitehall* v. *Whitehall*, 1957 S.C. 30, noted in [1957] C.L.J. 9. Since these evidentiary privileges are limited in scope and under the control of the court, it appears that Crown privilege, although clearly sanctioned by *Duncan's* case, can be used to give the executive still wider privileges of its own. From the viewpoint of the administration of justice this use of Crown privilege, when the material in question does not relate to important military or foreign affairs, has caused and still causes a good deal of concern.

DAVID E. NELSON.

CERTIORARI—COUNTY COURT—MANIFEST ABSENCE OF JURISDICTION

In *R.* v. *Hurst, ex p. Smith* [1960] 2 W.L.R. 961 the applicant, Smith, sought an order of certiorari to remove into the High Court and to quash the decision of a county court judge on the ground that, in the circumstances, the judge had had no jurisdiction. The Divisional Court granted the application, and so put an end to the doubt, which had previously existed, whether certiorari would lie to a county court, after the entry of judgment, for any purpose other than execution.

The facts were quite simple. The Representation of the People Act, 1949, empowers an electoral registration officer to determine the persons entitled to be listed as electors, subject to an appeal to the county court. Ninety-six students of Ruskin College, Oxford, of whom Smith was one, had been entered as duly qualified electors on the register for the City of Oxford, the registration officer having overruled the objection of a Mr. Gower to their inclusion. Gower, not satisfied with this decision, appealed to the county court; but brought his appeal in regard to six only of the ninety-six persons originally concerned. Smith was one of the ninety others who were not made parties to the appeal. The county court judge ruled that only two of the names should remain on the register and that the others should be removed, and in subsequent written directions indicated that it was his intention that those whose names were to be removed should include not merely the four unsuccessful parties to the appeal, but also the other ninety. It was apparent that the judge had thought that the proceedings had been in the nature of a test case, pursuant to some arrangement made between those concerned. The result was that Smith and his eighty-nine colleagues had had their names removed without their individual circumstances being considered, without a hearing or even the opportunity of a hearing, and more particularly, without their having been formally made parties to the appeal and served with the notice required by the County Court Rules, 1936, Ord. 43, r. 8. It was quite clear, therefore, that both under the general principle of natural justice usually referred to as *audi alteram partem* and on the stricter ground that the essential statutory procedure had not been followed, the judge had acted without jurisdiction and that a prima facie case for certiorari had been made out. Indeed, on this point the court did not find it necessary to cite any authority; but students will remember such leading cases as *Capel* v. *Child* (1832) 2 Cr. & J. 558 and *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180.

There remained one objection for the court to deal with. Section

115 (1) of the County Courts Act, 1959, provides for the removal by certiorari or otherwise of proceedings from the county court to the High Court for the purpose of *hearing and determining* those proceedings in the High Court; and section 107 states that no county court judgment, order or proceedings " shall be removed by appeal, motion, certiorari or otherwise into any court whatever " except in accordance with the provisions of the Act. These two sections taken together would appear to provide that, although certiorari may be available to remove uncompleted proceedings for the purpose of trial, no corresponding remedy lies to quash proceedings after judgment.

This contention was rejected by the court. Lord Parker C.J. (with whose judgment the other members of the court agreed) applied the well-established principle that a statutory provision taking away certiorari will not preclude the making of an order where there has been a manifest absence of jurisdiction. The leading case cited in the judgment is *Ex p. Bradlaugh* (1878) 3 Q.B.D. 509; perhaps an even better-known authority is *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417. Accordingly, certiorari to quash was granted, together with the " almost consequential " relief of an order of mandamus to the registration officer to restore the applicant's name to the electoral list.

The decision in *R.* v. *Hurst* is most welcome. It would not have been open to Smith to appeal to the Court of Appeal, since he had not been a party to the county court proceedings; and it is wholly desirable that a remedy should not be lacking to correct irregularities such as this. Again, it is satisfactory that the rules as to certiorari applicable to inferior tribunals in general should also govern the county courts. But it is disappointing that neither the speeches of counsel nor the judgment of the court appear to have dealt with the statements in Halsbury's *Laws of England* (3rd ed., Vol. IX, 128, 130) that a civil action cannot be removed from an inferior court by certiorari, after final judgment, for any purpose other than execution. Nor was any reference made to the decision of Parke B. in *Lawes* v. *Hutchinson* (1835) 3 Dowl. 506 (on which the passages in Halsbury are based) that certiorari did not lie to quash proceedings in the old Palace Court after judgment had been delivered. It is submitted, however, that a number of arguments could have been advanced in *R.* v. *Hurst* to refute these authorities. First, *Lawes* v. *Hutchinson* was a decision based on the rules of the now abolished Palace Court: the wording of the judgment does not warrant the general language of the passage in *Halsbury*, and there is no necessary analogy between the Palace Court and the modern county courts. Moreover, certiorari has been granted to

quash judgments of other civil courts, *e.g.* magistrates' courts hearing licensing or bastardy cases: see *R.* v. *Lincolnshire Justices, ex p. Brett* [1926] 2 K.B. 192, and *Jennings* v. *Kelly* [1940] A.C. 206. Secondly, the basis of the decision in *Lawes* v. *Hutchinson* was that the proper remedy after judgment in the Palace Court was a writ of error, and it had long been the rule that certiorari would lie only where error did not. But, even accepting that this reasoning is appropriate in the case of the modern county court, error did not lie on the ground of want of jurisdiction (and surely the argument is even stronger in the case of a non-party such as Smith, who could not proceed by way of appeal); and in cases as old as *Kemp* v. *Balne* (1844) 1 Dow. & L. 885, it had been suggested that certiorari to quash the proceedings of an inferior civil court would lie where there had been no jurisdiction. This view was repeated in the recent case of *R.* v. *Worthington-Evans, ex p. Madan* [1959] 2 Q.B. 145, but the passage (at p. 152, *per* Donovan J.) was *obiter* and counsel had accepted the point without argument, so that this case, although cited in the judgment in *R.* v. *Hurst*, was not a very strong authority. In the circumstances it is regretted that these issues were not more fully considered in *R.* v. *Hurst*.

L. S. Sealy.

STATUTE—REPEATED OFFENCE—RELATOR ACTION—INJUNCTION

In *Attorney-General* v. *Harris* [1960] 3 W.L.R. 532 the defendants were flower-sellers at the gates of a cemetery. One had been convicted 142 times, and another 95 times. On each occasion the conviction was either for obstructing the passage of a footpath, or for erecting a stall. The convictions were under a section of the Manchester Police Regulation Act, 1884, and generally carried penalties varying between forty shillings and ten shillings. The offences were committed weekly.

Eventually the matter was referred to the Attorney-General who brought a relator action against both defendants claiming an injunction perpetually to restrain them from placing any stall or other article upon any footway in the City of Manchester, or from selling flowers on or near such footway so as to obstruct the passage. Salmon J. held that the acts of the defendants had not inconvenienced any member of the public; that they did not tend to injure the public, and that in the exercise of his discretion he would not grant an injunction. The Attorney-General appealed. The Court of Appeal found that persistent and deliberate flaunting of the law was, in itself, a grave and serious injury to the public, and following the well-known case of *Attorney-General* v. *Sharp*

[1931] 1 Ch. 121 granted the injunction, since the monetary penalties imposed by statute were ineffective to secure compliance with the law. The *Sharp* case was also under the same Manchester Act, and related to repeated breaches of the law relating to hackney carriages and buses plying for hire. The interesting point of the present case is the view of the Court of Appeal that the Attorney-General is in a different position from an ordinary litigant, since he represents the public interest and the community at large. His intervention, therefore, is in the interest of law and order generally, and the court will pay great heed to his intervention, and will also normally be disposed to grant an injunction. In adopting this view Pearce L.J. expressed his agreement with the feelings of Salmon J. that the defendants' acts were in themselves trivial, and insufficient to justify an injunction. So it would seem that the maxim *de minimis* should not apply, if the Attorney-General in his administrative discretion decides that a relator action should be brought.

This case may be compared with *Attorney-General* v. *Smith* [1958] 2 Q.B. 173, noted in [1959] C.L.J. 1.

E. C. S. Wade.

ADMINISTRATIVE LAW—ULTRA VIRES—RENT SUBSIDIES

One of the less sensational but more instructive episodes in the struggle over rents in St. Pancras is the decision of the Queen's Bench Divisional Court in *Taylor* v. *Munrow* [1960] 1 W.L.R. 151. It is a case that might be pondered by those who say that in England the judicial control of administrative powers does not go far enough. It raises again that pregnant question, " does the law require that powers should be exercised reasonably?" Not only was the answer, in this case, in the affirmative: the St. Pancras Borough Council were held to have exceeded their powers by a policy of mere inaction, by failing to increase their rents. A number of councillors were surcharged by the district auditor for failing to exercise a particular discretion, which by its non-exercise imposed a financial burden on the ratepayers.

At the heart of the Council's problem was the Rent Act, 1957, and the rise in rents which the Act brought about. The particular difficulty was to decide on the rent policy for derequisitioned houses. Under the Requisitioned Houses and Housing (Amendment) Act, 1955, local authorities could derequisition houses under an arrangement whereby the owner accepted the sitting tenant as a statutory tenant under the Rent Acts, and the existing rent was to remain unchanged " except so far as the local authority may from time to time determine." The existing rents were in many cases

even lower than the standard rents permitted under the Rent Acts, and under the Act of 1955 any such difference was made good to the landlord by subsidy, payable by the local authority. When the general level of rents rose in consequence of the Rent Act, 1957, the gap widened and the subsidy rose. The Council then had to determine whether to raise the rents, and so spare their ratepayers' pockets, or whether to let the ratepayers bear the whole cost of the augmented subsidy. How far should they temper the winds of change and shelter the tenants from the effect of the Rent Act? At that time the majority of the Council were politically hostile to the Rent Act, and also to any rent scheme which involved a means test. They therefore resolved not to raise the rents and not to investigate individual cases. The cost of this policy, of course, fell on the ratepayers.

Some of the opposing councillors then resorted to legal action and challenged the subsidy before the district auditor. The auditor's statutory duty is to disallow such payments as are contrary to law, and to surcharge the persons responsible. He accepted the argument against the legality of the increased subsidy and gave his reasons at length. As briefly summarised by the Lord Chief Justice, they were that the Act of 1955 did not give the Council an absolute discretion, but a discretion under which they were bound to act reasonably, preserving a balance between the duty which they owed to the general body of ratepayers and the duty they owed to the particular tenants. The Council, it was held, had never really faced the problem at all within the ambit of their duty, so that the excess element in the subsidy was paid in breach of duty and unlawfully. The councillors responsible were accordingly surcharged, and they appealed to the Divisional Court. The court, through the mouth of the Lord Chief Justice, entirely agreed with the auditor. They took it as proved that the Council's dominant motives were dislike of the Rent Act and dislike of a means test. Their policy, simply stated, was to protect the tenants from the Rent Act. Their decision was held to be purely arbitrary, because they had neglected to fulfil their duty to the general body of ratepayers. The Lord Chief Justice then pointed out the similarity with *Roberts* v. *Hopwood* [1925] A.C. 578, the famous case of the minimum wage in Poplar. He quoted from Lord Atkinson's speech the celebrated remark that the Poplar Council had erred in allowing itself to be guided by some eccentric principles of socialistic philanthropy; he also quoted Lord Atkinson's statement that a body charged with the administration for definite purposes of funds contributed by others owes a duty to those others to conduct that administration in a fairly businesslike manner with reasonable

care, skill and caution, and with a due and alert regard to the interest of the contributors. The authority's position is fiduciary, somewhat like that of a trustee, as was recently made clear in the case of the scheme for free travel for the aged in Birmingham, *Prescott* v. *Birmingham Corporation* [1955] Ch. 210, noted in [1955] C.L.J. 135. The mistake of the St. Pancras Council was to suppose that the Act gave them free discretion to adopt their own policy, whereas in fact the Act did not absolve them from their duty under the general law, which was to do what was fairly required in the interests of their ratepayers. Had they paid due regard to this duty, they should have raised the rents.

Yet how much " policy " should a local council be allowed? If Parliament expressly provides that rents are to remain fixed unless the council thinks fit to raise them, is it right for a court of law to compel the council to raise them? Just as in the *Poplar* case of 1925, the court takes upon itself the decision of a most important political question, and in effect tells local authorities that they may not exercise their powers for certain kinds of political purposes. One of the surcharged councillors said: " Our attitude towards the derequisitioned tenants arises from the policy of this council. We do not believe that the circumstances at the moment justify a local authority imposing rent increases on its tenants. That is our political position, we honestly believe that, we fight for that, and, bearing that in mind, the fact that we have refused to impose or permit to be imposed rent increases on the derequisitioned tenants follows consequentially." Should the courts place legal impediments in the way of elected bodies carrying out such policies? The answer at present seems to be: " Yes, if it means providing novel social services or subsidies at the expense of ratepayers." The judicial philosophy, as it can be gleaned from the cases, is that expensive sociological experiments are the business of Parliament, not of local authorities, and should be decided at the national level. This is a very important restriction on local authorities, and by imposing it the courts have introduced a constitutional principle. Each case, of course, is decided in terms of the particular Act of Parliament which governs it, in terms of a local authority's fiduciary duties, and in terms of the doctrine that powers must be exercised within the bounds of reasonableness, and on right and relevant grounds. But the underlying judicial policy has become clearer now that there are these later decisions to keep *Roberts* v. *Hopwood* company. It certainly cannot be said that in these cases the courts have been shy of controlling administrative policies.

H. W. R. Wade.

CONTEMPT OF COURT—" PENDING " CRIMINAL PROCEEDINGS

R. v. *Duffy, ex p. Nash* [1960] 3 W.L.R. 320 was concerned with the law relating to contempt of court—a subject of topical interest in view of the investigation made by the Shawcross Committee of " Justice " in 1959, and the reforms contained in the Administration of Justice Act, 1960.

On May 9, 1960, James Lawrence Nash was convicted on a charge of causing grievous bodily harm, and sentenced to five years' imprisonment. Next day the *Daily Sketch* published an article purporting to describe his character and criminal background, and referring to him (*inter alia*) as a "small-time hooligan with big ideas " and " an obscure thug." It was against the writers of this article and the editor of the newspaper in which it appeared that Nash now brought proceedings for writs of attachment for contempt of court, on the grounds that the hearing of his appeal to the Court of Criminal Appeal was likely to be prejudiced. An application for leave to appeal against both conviction and sentence was in fact made by Nash, but not until some eight days later.

Two points arose. In the first place, the article in question had been published after the conviction and sentence of the applicant, although before the time for applying for leave to appeal had elapsed. Were there, in these circumstances, proceedings still *sub judice* or pending? An earlier case, *R.* v. *Davies, ex p. Delbert-Evans* [1945] K.B. 435, is authority for the proposition that, where an appeal has been brought, contempt of court can be committed at any time until after the appeal has been heard and the decision given. In *R.* v. *Duffy* this rule was extended: a criminal case, it was held, remains *sub judice* for the purpose of proceedings for contempt of court " at any rate until the time has expired within which notice of appeal to the Court of Criminal Appeal may be given, or, in the event of such notice being given, until the appeal has been heard and determined." Indeed, the judgment has left it open for a court at some later date to cast its net still wider, and stifle comment even after the decision of the Court of Criminal Appeal, on the ground that the proceedings might go to the House of Lords.

This ruling, though perhaps making it easier for the editors and publishers of newspapers to know how they stand as regards comment in criminal trials, is hardly likely to find favour with those who advocate a less restricted press. The view is widely held that the present law, by forbidding or at least discouraging any comment on matters *sub judice*, prevents responsible discussion and criticism of some aspects of the criminal law at the time when it is

most effective—when the question is still topical after a case which has attracted some public interest. The effect of the decision in *R.* v. *Duffy* may be to postpone such comment even longer.

The second point dealt with by the court was whether the matter contained in the article constituted a contempt in fact. The test was, on the basis of the authorities, whether the tendency of the article was " to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it " or " to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned." It did not matter whether the publication was objectionable, or in bad taste; the only question was whether it was likely to interfere with a fair trial. (Lord Parker C.J., at p. 325, used the phrase " *intended or* calculated to prejudice " and briefly examined the possibility of a malicious intention; but it is doubted, with respect, whether this question is relevant to liability in view of the decision in *R.* v. *Odhams Press Ltd., ex p. Attorney-General* [1957] 1 Q.B. 73, that the offence is independent of *mens rea.*) The court ruled that the article was not likely to have such an effect. Lord Parker C.J. said (at p. 325): " Even if a judge who eventually sat on the appeal had seen the article in question and had remembered its contents, it is inconceivable that he would be influenced consciously or unconsciously by it. A judge is in a very different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case. This, indeed, happens daily to judges on assize. This is all the more so in the case of a member of the Court of Criminal Appeal, who, in regard to an appeal against conviction, is dealing almost entirely with points of law, and who, in the case of an appeal against sentence, is considering whether or not the sentence is correct in principle."

In taking this view the court disagreed with the opinion of an earlier Divisional Court in *R.* v. *Davies* (*supra*) that it would be a contempt of court to " embarrass " a judge by informing him of " matters which he would much rather not hear and which make it much more difficult for him to do his duty." The court in *R.* v. *Duffy* considered that it was not sufficient that the published matter should " put upon the judge, quite unnecessarily, the task of dismissing the offending matter from his mind." " The question always is," Lord Parker C.J. concluded, " whether a judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected."

It is, of course, well established that when a court is considering a case of contempt it is entitled to take into account the nature of the tribunal concerned, and that far less may amount to contempt in the case of a jury than is required when the hearing is by a judge. The question is in each case one " of fact, of degree and of circumstances." The present decision confirms this, and furthermore suggests that a publisher may have rather more freedom when a Court of Criminal Appeal case is pending than he could when the hearing is before a High Court judge. There is also the rather paradoxical consequence that informed and serious comment may more readily be held to be contempt than scurrilous gossip on the grounds that experienced judges are unlikely to be influenced by the latter. Moreover, may not the court in this case have paved the way for the embarrassment of the members of some future court, who, in committing for contempt, may be obliged to find that a brother judge has failed, consciously or unconsciously, to be impartial?

L. S. Sealy.

CRIMINAL LAW—MURDER—PRESUMPTION OF INTENT

There are many instances of the courts nullifying ancient legislation by diplomatic means, like the *ejusdem generis* rule, when the legislation seemed to be out of keeping with present needs; but it is rare for a recent statute to be treated so cavalierly by the courts as has now happened in the case of section 1 of the Homicide Act, 1957. The attitude of the judges is all the more surprising when it is realised that that section was passed not as a mere technical change in the law but after hot political debate, with democratic forces ranged on both sides of the question.

The facts of the case prompting this comment, *D. P. P.* v. *Smith* [1960] 3 W.L.R. 546, are well known. Smith, finding a constable hanging on to his car and proposing to search it on the well-founded suspicion that stolen goods would be revealed, accelerated and zigzagged with the object of throwing the constable off. The constable fell in front of an oncoming car and was killed. No serious case was made that Smith intended to kill the constable, but he was charged with murder on the ground that he had intended to inflict grievous bodily harm. In the course of summing up, the learned judge instructed the jury in terms of the presumption that a man intends the probable consequences of his acts. The jury convicted of murder. On appeal to the Court of Criminal Appeal, the direction was held to be improper and the conviction was reduced to manslaughter. The Crown then appealed to the House of Lords,

it being announced that in any case the death sentence would not be executed. The House of Lords restored the conviction of murder.

It will be seen that the legal question in the case turned upon the presumption of intent, and, more particularly, upon the question whether a subjective mental element is necessary in murder, or whether, on the contrary, this crime is committed whenever a reasonable man would foresee the consequences—the " objective " view. In other words, must it be shown that the accused intended to do grievous bodily harm, or is it enough to show that a reasonable man would have foreseen it?

The answer given by the House of Lords can be summarised by saying that in murder the only requisite mental element is that the accused should have intended to do something unlawful to someone. Then, if the act done was in fact of such a kind that grievous bodily harm was the natural and probable result, and if it in fact causes death, the accused is guilty of murder—apart, of course, from the usual defences like provocation and diminished responsibility.

It seems obvious that this rule must apply to almost any killing in the course of a violent rape or robbery. In fact, it must apply to almost every instance of the felony-murder rule, as that rule was interpreted immediately before the Act of 1957, notwithstanding that the felony-murder rule was abolished by the Act. As if that were not bad enough, the new rule applies to any killing in the course of an unlawful and dangerous act done to someone; therefore, it is not only a felony-murder rule but a misdemeanour-murder rule and a summary-offence-murder rule. That Lord Kilmuir L.C., who delivered what was in effect the judgment of the House, meant this may seem too surprising to be believed; yet it plainly follows from the words he used—words that must have been carefully chosen, since they were assented to without qualification by all the other Law Lords.

We are accustomed in England to the process of conceptual inbreeding by which judges read and cite each others' judgments but almost entirely ignore discussions in the learned periodicals of the common law world. So it is no surprise that Lord Kilmuir, in affirming the rule previously laid down by the Court of Criminal Appeal in *Ward* [1956] 1 Q.B. 351 and *Vickers* [1957] 2 Q.B. 664, neither stated nor attempted to meet the heavy weight of criticism directed against those decisions. In Oxford, Dr. Goodhart referred to *Ward* as " that unfortunate case " (72 L.Q.R. 166); Mr. Turner delivered a broadside against *Vickers* in [1958] Crim.L.R. 15; and a number of other academic pronouncements to the same effect could be cited, together with Sir Patrick Devlin's condemnation by intelligent anticipation in [1954] Crim.L.R. 668. In the same way,

it is no surprise that the judgment is silent on the political effect of the decision, though it clearly defeats the basis on which the Homicide Act was debated and passed.

As regards the few authorities selected for treatment in the judgment, it is sufficient to summarise by saying (1) that the judgment cites a passage from Holmes without adverting to the fact that Holmes' views on objective criminal responsibility are generally regarded as an unfortunate aberration on his part; (2) that it misstates the outcome of *Faulkner* (1877) 13 Cox C.C. 550 and relies upon an *obiter dictum* in that case which is clearly inconsistent with later authority; (3) that it cites *Lumley* (1911) 22 Cox C.C. 635 without considering that that case turned on the felony-murder doctrine which is now abolished; (4) that it selects a somewhat baffling sentence from *Beard* [1920] A.C. 479 but does not say that the whole tenor of Lord Birkenhead's speech is in favour of treating the intent to do grievous bodily harm as a subjective question; and (5) that it regards *Vamplew* (1862) 3 F. & F. 520 as the sole authority for the subjective view, when this is by no means the case.

It seems from one passage in the judgment that the decision of the Court of Criminal Appeal in *Meade* [1909] 1 K.B. 895 may still be regarded as good law, so that evidence of drunkenness is admissible to rebut the presumption that a man intends the probable consequences of his acts; but according to Lord Kilmuir such evidence of incapacity seems to be practically the only way in which the presumption can be rebutted. If so, we are back to a rule of fictitious intent from which progressive thought has been trying to free the law since the days of Bentham. But it may perhaps be contended that the decision in *Smith* is to be confined to the crime of murder, and does not cut down the evidence admissible on the issue of intention in other crimes.

The only way in which the decision alleviates the previous law is that it redefines " grievous bodily harm " so that it no longer covers a mere interference with health or comfort. It is still not requisite that the grievous bodily harm to be foreseen by the fictitious ordinary man should be such as to be dangerous to life.

GLANVILLE WILLIAMS.

RESTITUTION—RECOVERY OF ILLEGAL PAYMENT

THE decision of the Judicial Committee of the Privy Council in *Kiriri Cotton Co. Ltd.* v. *Dewani* [1960] A.C. 192 seems likely to provide a leading case on the recovery of money paid on an illegal

transaction and the question of *par delictum* as between parties to such a transaction.

The plaintiff, hard pressed for accommodation, took one of the defendants' flats for which he had to pay a premium of 10,000 shillings. As it turned out, this was a payment directly prohibited by the Uganda Rent Restriction Ordinance, 1949, though owing to a mistake (an easy one to make, so the Committee thought, in view of the wording of the Ordinance) neither party appreciated the illegality. There was no evidence that the premium was an extortionate sum, but still " no matter whether the mistake was excusable or inexcusable, or the premium fair or extortionate " the payment was illegal. The Ordinance did not provide, as does the English legislation on this subject, a statutory right of recovery and the plaintiff brought an action for money received to his use by the defendants. He won in both the High Court of Uganda and the Court of Appeal for Eastern Africa. The defendants now appealed.

The Committee, whose judgment was delivered by Lord Denning, started by pointing out that the well-known statement by Lord Ellenborough in 1813 that " what is done in contravention of an Act of Parliament, cannot be made the subject-matter of an action " (*Langton* v. *Hughes* (1813) 1 M. & S. 593, 596) was not applicable. As Le Blanc J. said in that case (p. 597), " the court will not lend its aid in order to enforce a contract entered into with a view of carrying into effect anything which is prohibited by law," and there is a distinction between positively enforcing an illegal contract and seeking to recover money paid under it. Nevertheless even in the latter instance recovery is not generally possible where the illegal contract has been fully executed, and here the transaction had been clearly executed. The plaintiff therefore was compelled to argue that his claim fell within an established exception to this principle in that he was not *in pari delicto* with the defendants.

Was he? At first sight, yes, because the money was paid voluntarily, under no mistake of fact (but under a mistake of law), without any extortion, oppression or imposition. Thus in *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K.B. 552 an insurance agent innocently misrepresented to the plaintiff that an insurance on his mother's life would be valid. It was held that premiums could not be recovered as the parties were *in pari delicto*, there being no *mala fides*, inequitable dealing, or even an obligation on the agent to make a correct statement of law. Lord Denning, however, did not accept the view that in the instant case both parties were equally at fault, saying (p. 204): " Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and

without more, cannot be recovered back. . . . If there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake, then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other —then they are not *in pari delicto* and the money can be recovered back; see *Browning* v. *Morris* (1778) 2 Cowp. 790, 792, by Lord Mansfield." The Committee, concluding that " the duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant," therefore approved the plaintiff's claim.

Other points of interest in the case are, first, a dictum on the nature of a claim in quasi-contract, and secondly, a point of statutory construction. An action *quasi ex contractu* is not, despite its name, " an action on contract or imputed contract. If it were, none such could be imputed here, as their Lordships readily agree " (p. 204). The point of construction arose because of the absence of a statutory remedy for recovery. It was argued that this impliedly denied the right of bringing any civil action, because modern statutes contemplating recovery usually make express provision. But the Committee rejected this argument, approving the judgment of Parker J. in *Green* v. *Portsmouth Stadium Ltd.* [1953] 1 W.L.R. 487. It is idle to match cases on questions of construction; the only point of principle is the nature of the presumption which the law raises when, as in this case, criminal sanctions are provided and no statutory remedy for recovery is given. There seems no good reason why an action which is maintainable at common law should not be brought unless the statute expressly or impliedly (owing to its purpose and provisions) gives a contrary answer. That answer is not to be collected solely from the provision or absence of other sanctions or remedies, though these factors may help in ascertaining the intention of the legislature. This way of putting it seems preferable to saying that no action lies unless the statute expressly or impliedly authorises or contemplates such an action. The authorities are not very clear on this point and indeed Lord Denning himself seems to have spoken with two voices (see his remarks in *Green* v. *Portsmouth Stadium Ltd.* [1953] 2 Q.B. at pp. 195–196). The same point arises in claims for damages where a statutory duty has been broken. The variety of statutory contexts makes a clear answer difficult and probably the only answer applicable to all circumstances is that, whatever the presumption, the court must endeavour to ascertain the intention of the legislature as expressed in the statute.

The case affords an interesting example of disparity in wrongdoing. When does the balance of parity tilt? Not only where there is fraud or inequitable dealing between the parties, but also, it seems, whenever one side fails to discharge to the other a duty which is cast on him for that other's protection. Such duties no doubt are numerous, but must depend for their recognition on the attitude of the court, especially towards the purpose and aim of different prohibitory enactments. Finally it may be said that if the balance is down on one side where the parties are both unconscious of illegality, it is not altered where a guilty conscience is added to both sides: see *Gray* v. *Southouse* [1949] 2 All E.R. 1019, where Devlin J. allowed an action for recovering a premium illegally paid on a consideration which had totally failed, a case where no claim was made under the statutory remedy of the Rent Restriction legislation.

D. E. C. Yale.

CONTRACT—MISTAKE—IMPERSONATION BY PURCHASER

Ingram v. *Little* [1960] 3 W.L.R. 504 is one of those happy cases which directly raise an issue of long-standing juristic dispute.

Three ladies living in Dorset owned a Renault Dauphine which they advertised for sale. A man giving his name as Hutchinson came to see it and eventually offered £717, which was acceptable. But when he produced a cheque book Miss Ingram (one of the owners) stated plainly that unless he paid cash the deal was off. Thereupon the man attempted to convince them he was reputable, explaining that he was P. G. M. Hutchinson of Stanstead House, Stanstead Road, Caterham, and had business interests in Guildford. One of the ladies consulted a telephone directory which showed a subscriber of that name and address; and the decision was then taken to sell to the man in return for his cheque.

This took place on the Saturday before August Bank Holiday, and on the following Tuesday the car was sold in Blackpool to the defendant. When the ladies presented their cheque it was dishonoured, and it transpired that P. G. M. Hutchinson of Stanstead House had been in no way concerned with the transaction. The rogue meanwhile had disappeared and the ladies sued the defendant for conversion of their car. But, as he had bought it in good faith, he was clearly protected by the Sale of Goods Act, 1893, s. 23, unless the contract between the ladies and the rogue was void.

The sole question, therefore, was the effect of the ladies' mistake. Slade J. at first instance and Sellers and Pearce L.JJ. in the Court of Appeal held that this had prevented the formation of a contract;

and thus the defendant was liable. All three derived assistance from Professor Goodhart's article on Mistake (57 L.Q.R. 228) and showed a corresponding coolness towards Pothier. The true question was objective: how ought the promisee to have interpreted the promise; though when the promisee was aware of the promisor's state of mind (having fraudulently induced it) the question became simply: what did the promisor intend? The trial judge had 'not the slightest hesitation' in reaching the conclusion that the ladies' offer to sell was made solely to the real P. G. M. Hutchinson; and Sellers L.J., while conceding that the question might be hard to answer in some cases, felt no doubt here. Pearce L.J. had more difficulty in determining 'whether the vendor was selling to the man in her drawing room (fraudulently misrepresented as being a man of substance with the attributes of the real Hutchinson) or to P. G. M. Hutchinson of Stanstead House (fraudulently misrepresented as being the man in her drawing room)' but as this was a question of fact of a borderline nature he was not disposed to disturb the finding of the trial judge who had heard the witnesses.

Phillips v. *Brooks* [1919] 2 K.B. 243 might seem to have stood in the way of this decision, but Sellers and Pearce L.JJ. distinguished it on its facts, inclining to share Viscount Haldane's view (expressed in *Lake* v. *Simmons* [1927] A.C. 487, 501) that there the misrepresentation of identity took place after the contract of sale had been made. Here, on the other hand, no contract was in existence at the time the rogue made his false assertion of identity.

The dissenting judgment of Devlin L.J. contains a penetrating discussion of the problem. The first question, he agreed, was to decide whether there was offer and acceptance; but the question with whom Miss Ingram intended to contract could not be solved as a pure question of fact, to be answered best by the trial judge. The question could have no meaning for Miss Ingram since she believed both persons to be the same. Presumptions must therefore be applied (as elsewhere in contract law when a party's mind was not directed at the time he entered into the contract to the specific question) and thus the law should normally presume an intention to contract with the person to whom the words of contract are addressed. So here there was offer and acceptance in form.

Nevertheless the resulting agreement could still be vitiated by mistake, though to be sufficient the mistake must (at the least) frustrate the object of the contract. Its sufficiency must be determined by the law (just as the law decides questions of frustration) and here Miss Ingram's mistake as to the stranger's identity was, contrary to her own belief, immaterial. She was really concerned with his creditworthiness, which "is only a way of expressing the

belief that each party normally holds that the other will honour his promise."

This view was admittedly in conflict with Viscount Haldane's speech in *Lake* v. *Simmons*, but, in Devlin L.J.'s opinion, the *ratio decidendi* of that case lay in the construction of the insurance policy. He therefore considered he was not bound by Viscount Haldane's wider observations.

This approach has the great attraction of cutting through the difficulty in the " face to face " situations of deciding to whom the offer was made; and the suggested link between vitiating mistake and frustration is conducive to elegance in contract law as a whole. But most challenging of all is Devlin L.J.'s criticism of a system which rests the defendant's liability in conversion on the fine distinction between a void and voidable contract, particularly when this depends on inferences from a conversation in which he took no part. Instead, as between innocent victims of a third person's fraud, there should be loss distribution. As Devlin L.J. reminds us, the principle of apportionment has already been successfully introduced in other fields by the Law Reform Acts of 1935, 1943, and 1945. His suggestion that statute should now extend it to this field merits urgent consideration.

J. C. Hall.

CONTRACT—THIRD PARTY—EXEMPTION CLAUSE—STEVEDORES

The judgment of Diplock J. in *Midland Silicones Ltd.* v. *Scruttons Ltd.* [1959] 2 W.L.R. 761, noted in [1959] C.L.J. 150, has been affirmed in the Court of Appeal (Hodson, Pearce and Upjohn L.JJ.); [1960] 3 W.L.R. 373. Leave was given to appeal to the House of Lords; but it seems extremely unlikely that a different result would be reached by their Lordships.

What is unsatisfactory is not the result of the case on its rather special facts but the process of reasoning adopted to attain to that result.

The action was one in tort brought by the owner of the goods (the plaintiff-respondent) against the stevedores (the defendants-appellants) who had negligently damaged the goods. The carriers, who had hired the stevedores, had in their contract of carriage with the owner limited their own liability to $500 per package. The damage done by the stevedores exceeded that amount. Could the stevedores avail themselves of that limitation in the action brought against them by the owner?

All the judges answered the question in the negative; and the negative answer would seem to be correct if it is borne in

mind (i) that the contract of carriage, as construed by the court, did not expressly or by implication govern the relationship between the owner and the stevedores, who were not carriers or bailees within the meaning of the contract of carriage; (ii) that the carriers did not, and did not purport to, contract for the benefit of the stevedores; (iii) that, in the contract of employment between themselves and the carriers, the stevedores had not excepted or limited their own liability for negligence; and (iv) that the exemption clause in question contained a pecuniary limit on liability for negligence and did not amount to an exception of negligence.

If the *Midland Silicones* case is restricted to a situation of this kind it is no doubt harmless enough. But it is likely to be misleading to the student; for all the judges refer to *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847 as if it were relevant, whereas it was expressly found that in the *Silicones* case there was no attempt to contract for the benefit of third parties. And all the judges cast doubt upon the statement of Scrutton L.J. in *Mersey Shipping & Transport Co. Ltd.* v. *Rea Ltd.* [1925] 21 Ll.L.Rep. 375, 378, that servants or agents acting under a contract cannot be sued in tort as independent people but can claim the protection of the contract made with their employers on whose behalf they are acting, whereas this statement is, in its proper context, not only correct but manifestly and evidently correct. If I order a garage to repaint my car, is it really to be supposed that I can sue in trespass the mechanic who is employed by the garage to chip off the paint preparatory to repainting? Surely the court might reasonably have been asked to give some attention to the truth contained in Scrutton L.J.'s proposition whilst denying (perhaps correctly) that it applied to the case before them.

The decision reached by the Court of Appeal accords with decisions reached both by the High Court of Australia and by the United States Supreme Court; and Pearce L.J. very properly remarked (p. 384) that " it is desirable that great common law jurisdictions should not lightly differ, more particularly on so universal a matter as commercial law." The irony of the matter is that a difference in our case has been avoided precisely because the United States Supreme Court held that the question of third party beneficiaries did *not* arise in this situation; for as Pearce L.J. himself noted (p. 387), that court " has considerably modified the rigour of the principle contained in *Dunlop* v. *Selfridge* which binds us "—an attractive and elegant meiosis: the *Dunlop* v. *Selfridge* principle has long ago been rejected in the United States.

C. J. Hamson.

CONTRACT—FRUSTRATION—SUEZ CANAL CASES

A TRILOGY of cases dealing with the sale of groundnuts for shipment from the Sudan to European ports was noted in our last issue (*supra*, p. 10). Two of these cases, *Tsakiroglou's* and *Albert D. Gaon's*, have now been considered by the Court of Appeal ([1960] 2 W.L.R. 869). It was held in both that the closure of the Suez Canal in November 1956 did not operate as a frustration of these c.i.f. contracts; and *Carapanayoti's* case, where the opposite conclusion had been reached, was expressly overruled. Leave to appeal to the House of Lords was granted upon terms.

No further comment seems required; but it should be noted that all three members of the Court of Appeal (Sellers, Ormerod and Harman, L.JJ.) expressly dissented from Diplock J.'s view in the *Tsakiroglou* case that the arbitrator's finding that the contract was frustrated was a finding of fact binding upon the court.

In *Société Franco Tunisienne D'Armement* v. *Sidermar S. P. A.* [1960] 3 W.L.R. 701, this trilogy of cases was distinguished by Pearson J., who held (with some hesitation—see p. 719) that a charter-party, though not expressly stipulating that the voyage in question was to be via Suez, was nevertheless frustrated by the closure of the canal. However, the distinction was made on the basis that " one may say shortly that it is obvious that the position is very different in a contract for the sale of goods " (p. 720).

C. J. HAMSON.

DEFAMATION—REPORT OF FOREIGN JUDICIAL PROCEEDING

Webb v. *Times Publishing Co. Ltd.* [1960] 3 W.L.R. 352 is a curious example of judicial caution and valour. The question was whether a newspaper report of a foreign judicial proceeding carried qualified privilege. There was no binding authority on the point. Counsel for the newspaper put forward two alternative contentions: that such a report was privileged, or that, at least, such a report was privileged if the subject-matter were of legitimate interest to the English public. (Naturally, counsel knew that he could bring his case within this limitation.) In a learned and careful judgment, to which this short note will do less than justice, Pearson J. gave his reasons for rejecting the first argument and accepting the second. Qualified privilege is accorded to reports of judicial proceedings in the United Kingdom, but one reason for this is that the public can drop in to hear the proceedings, which are thus public property; the Englishman, with his notorious inability to master foreign languages, would be unlikely to follow the proceedings if he listened to a Swiss court. Again, it is right that the

British public should be educated in the ways of their own courts, and this is a reason for the domestic privilege; but, *pace* Professor Hamson, the Cambridge LL.B., *The Times*, the Hamlyn Trust, and the Third Programme, education does not demand that our countrymen should take any interest in the proceedings of foreign courts. This argument for neglecting the ways of foreigners is reinforced by the fact that foreigners have a regrettable tendency to admit irrelevant evidence in courts of justice; and some foreign governments even stage trials for the sake of propaganda.

Whatever may be thought of these reasons, Pearson J. found himself able to concede some kind of privilege by invoking the blessed formula of legitimate interest. He gave examples of how this formula would work. A report of a judgment of the Supreme Court of the United States on a point of general commercial law would obviously be of legitimate public interest in England. So would a report of a foreign proceeding that has a special connection with English affairs (as was the case here). The same applies to any report of a foreign proceeding possessing an intrinsic world-wide importance, so that a reasonable man in any civilised country, wishing to be well informed, would be glad to read it, and would think he ought to read it if he had the time available. But a report that appeals only to idle curiosity or the desire for gossip is not privileged.

This narrower privilege is more complicated in application than the wider one would have been; it creates new problems for the legal staffs of newspapers. For all the attention given to public policy in the judgment, there is no reference to the need to have the law reasonably clear in application. Moreover, the distinction between legitimate and idle interest may lead to curious results. The staid Englishman who reads because he thinks it a duty to be well informed will presumably read matters affecting foreign public figures, even their divorces. But if the foreign judicial proceeding concerns only persons who are totally unknown to him, having no reputations outside their own locality, and the proceeding is reported not because of the personality of those involved but because it adds to the amusement of life and affords material for a light leader, the privilege will not attach. Hence the obscure foreigner is entitled to pay a brief visit to England and mulct English newspapers in damages (or an agreed settlement in recognition of his nuisance value) in circumstances when nobody else could do so. This appears to mean that the action is given only when the damage is necessarily minimal, and the action is least meritorious. It seems strange that a judgment apparently based in part on distrust of the foreigner and his ways should thus be, in

effect, the foreigner's charter of title to an unmeritorious award against English newspapers.

If a foreign government stages a propaganda trial, apparently a reasonable Englishman will not read the report. Consequently, he will not know that a propaganda trial is being staged. But is this really the attitude of the conscientious reader? Surely it is a legitimate matter of English interest to know that foreigners are prone to this sort of thing. But if so, what becomes of the assumption in the earlier part of the judgment that a report of a propaganda trial should not be privileged?

Sometimes a foreign trial sets off a scandal which is inflated into the main domestic item of news in the country concerned, shaking Church and Government. At what point of time does our English sobersides decide that the affair has passed from the piquant episode to something about which he ought to be informed?

In one respect, the decision may have a wider importance in the law of tort than if it had been rested on a simple privilege to report the proceedings of foreign courts. Pearson J. seemed to look with favour on the suggestion that any report of a proceeding of public interest is privileged, whether the proceeding is a judicial one or not. If this privilege comes to be established, it will be useful not only to newspapers but to pamphleteers and others who take part in current controversies, who are unprotected by the privileges conferred particularly upon periodicals. For the suggested privilege there was authority in a trio of cases ending with *Perera* v. *Peiris* [1949] A.C. 1 (P.C.). The judge acknowledged that in each of these three previous cases the newspaper had published an extract from or summary of a report made under statutory powers, but he thought that the rule could be extended at least to other situations where some appropriate " status " could be found. Here the status was that of foreign judicial proceedings. It seems that the word " status " is intended to indicate that there may be different categories of cases to which the new privilege may be extended piecemeal by judicial decision. If this is the law, it seems to be impossible to justify the ruling in *Standen* v. *South Essex Recorders Ltd.* (1934) 50 T.L.R. 365, that there is no privilege to report a meeting of a local authority on a matter of public interest. The actual decision in the latter case has become of little importance since the Defamation Act, 1952, ss. 7, 16 and Schedule, except in respect of non-contemporaneous reports or reports elsewhere than in periodicals. An encouraging feature of *Webb's* case is that it shows that the passage of the Defamation Act will not prevent the development of new privileges as a matter of common law.

GLANVILLE WILLIAMS.

DEFAMATION—JUDICIAL PRIVILEGE—DISCIPLINARY TRIBUNAL

THE decision of Gorman J. in *Addis* v. *Crocker* [1960] 1 Q.B. 87, noted in [1960] C.L.J. 3, has now been affirmed by the Court of Appeal, [1960] 3 W.L.R. 339. The plaintiff in person put forward five contentions why absolute privilege could not adhere to the proceedings of the disciplinary committee constituted under section 46 of the Solicitors Act, 1957, whose published findings, he claimed, contained statements defamatory of himself.

" Much his strongest point," as Upjohn L.J. said, was his submission that a tribunal which is compellable by its rules on all occasions to conduct its hearings in private (as was the committee) so far departs from the idea fundamental to British justice, that in general hearings should be in public, that it does not attract the protection of absolute privilege which normally attaches to judicial bodies. But this argument could not be sustained in face of the authorities: *Barratt* v. *Kearns* [1905] 1 K.B. 504; *Dawkins* v. *Lord Rokeby* (1873) L.R. 8 Q.B. 255; (1875) L.R. 7 H.L. 744. Thus while generally a tribunal with judicial functions should deliberate in public, there may be good reasons why either in particular cases or particular classes of cases the hearing should be in private. The High Court itself sometimes hears cases in private. Rule 21 of the Solicitors (Disciplinary Proceedings) Rules, 1957, which requires the hearing to be in private, is often a necessary protection to an accused solicitor whose conduct may be vindicated and who, without this protection, might suffer grievous harm before being vindicated by publication of the tribunal's decision after a necessary lapse of time.

The only other substantial argument advanced by the plaintiff was that the procedure laid down by the rules was inconsistent with a judicial function. But after a close consideration of the committee's functions and powers the court ruled against him. The decision seems just, for it would be a harsh conclusion that a witness should not be protected when his evidence may be taken on oath and his appearance enforced by subpoena (section 46 of the Act).

The plaintiff's other points were comparatively weak. His *autrefois acquit* argument, that a solicitor who has been before a criminal court may be afterwards charged before the committee and so put in peril twice, was not to the point. If there are subsequent proceedings in any court or tribunal, that does not mean that the subsequent hearing is not judicial. Nor does irregularity in judicial proceedings deprive them of their judicial character. Nor does the publication of findings and order, even if the hearing is

privileged notwithstanding its private character, fall outside the ambit of privilege; indeed the findings and order are an intrinsic part of the hearing.

So the plaintiff failed again. He had succeeded in showing that it is an axiomatic and general principle that justice must be administered in public, but he had failed to show that this principle carries the consequence that where courts are required to sit in private as a matter of course, they are for that reason to be deprived of their judicial character and their sittings are therefore not privileged occasions, and nothing less than this would have enabled him to succeed.

D. E. C. Yale.

TORT—HUSBAND AND WIFE—MEDICAL EXPENSES

The inability of one spouse to sue the other in tort is perhaps more productive of injustice than any other rule of that branch of the law. The matter is now under consideration by the Law Reform Committee, but one of its members has recently had occasion to consider the matter judicially. In *Gage* v. *King* [1960] 3 W.L.R. 460 the plaintiffs were a husband and wife who had been injured when a car in which he was the driver and she a passenger collided with a car driven by the defendant. Diplock J. found that the defendant was one-third and the husband two-thirds to blame for the accident. The situation was therefore the classic one of *Chant* v. *Read* [1939] 2 K.B. 346 and *Drinkwater* v. *Kimber* [1952] 2 Q.B. 281: the husband could recover only one-third of his damages, while the wife could recover in full, unembarrassed by her driver's negligence and happy in the knowledge that no contribution could be exacted from him. The point in the present case was whether the expenses incurred as a result of the wife's injuries were special damage recoverable by the wife or by the husband. These were doctors' and nursing home fees and the cost of additional domestic help after the wife's return home, though it is not clear whether this last item was akin to the other two or was merely a substitute for the services which the wife would ordinarily perform. The learned judge was able to find that the expenses were in fact incurred by the husband so that the amount recoverable was reduced by two-thirds. Husband and wife are not always able both to have their cake and eat it.

One's instinctive reaction is that medical expenses should in general be recoverable by the injured person without the need to join any other party as plaintiff. When a wife is injured, however, the position is rather different, as the husband will usually claim in

respect of the loss of his wife's services and society and so be a plaintiff in his own right. Medical expenses may certainly be included in a consortium claim and, it would seem, generally are claimed by the husband rather than the wife. (See, *e.g.*, Bullen & Leake's *Precedents of Pleadings*, 11th ed., p. 496; though *cf. Drinkwater* v. *Kimber* [1951] 2 All E.R. 713, where the special damages of £155 were carefully claimed by the wife.) In the present case the expenses were originally claimed by the husband and it was only by an amendment at the trial that they were claimed in the alternative by Mrs. Gage.

The grounds of this alternative claim were, first, that the amounts already paid had been paid, admittedly by the husband, but out of a joint bank account, and, secondly, that the wife's name appeared on the fee notes relating to such of the doctors' fees as had not yet been paid. It is the former ground that is of interest, for the learned judge's answer to this enabled him to dispose also of the second point, which in any case really depended upon the accident of a secretary's practice in sending out fee notes.

Both husband and wife could draw separately upon the account, which was fed by the income of each, though predominantly by the husband's. Counsel for the plaintiff therefore argued that in the absence of any express agreement the balance in the account at any time was owned by the two in equal shares, and that the wife had thus suffered a loss amounting to at least half the expenses paid. It is not clear how counsel hoped to increase this to the whole amount. His argument would seem to have been that the wife could have recovered the whole if she had drawn the cheque and the effect on the account would have been exactly the same if she had done so, so that it therefore did not matter which of them drew the cheque and she could recover just as if she had drawn it. One may readily agree that it should not matter which drew the cheque, for this is often a matter of accident or convenience in the case of a happily married couple; but the weakness of the argument surely lies in the assumption that the wife could have recovered all if only she had drawn the cheque. The ground for this assumption must be that it is the wife who suffered the physical injury; but this is an attempt to *appropriate* the loss according to its character and is really inconsistent with the attempt to *apportion* the loss with which counsel began.

Diplock J. rightly rejected the argument as based on " a fundamental misconception " (p. 463): so long as the marriage was subsisting it was not justifiable to attribute to the parties such specific share in the account as they might obtain upon its break-up. " What is to happen to the balance in the joint account when the

marriage breaks up is a very different question from that of the mutual rights of the parties in relation to the account while the marriage is still subsisting " (p. 464). Those mutual rights were covered by the well-known principle of *Balfour* v. *Balfour* [1919] 2 K.B. 571 and were not meant to be attended with legal consequences as between the spouses. In other words, in a case like this it is not " he " or " she," but " they," who suffer the loss.

Nevertheless, the answer had to be " he " or " she "; so the question " who suffered the loss " was transmuted into " who incurred the legal liability to pay the expenses," and an acceptable answer could be found in a wife's authority to pledge her husband's credit for necessaries. These expenses were assumed to be necessaries which the husband was under a legal duty to provide for her, so that the liability to pay them was presumed to be the husband's, even if—which was unlikely—the wife had made the arrangements, and even though the fee notes bore her name. The special damage was therefore attributable to the husband: only one-third could be recovered from the defendant and his insurers and the husband (but not his insurers?) was left to bear the rest.

This result may be satisfactory, but it is perhaps regrettable that the learned judge found it necessary to dissent from the recent decision in *Schneider* v. *Eisovitch* [1960] 2 W.L.R. 169, even if it had suffered the weighty disapproval of the editor of the *Law Quarterly Review*. That case, which is the subject of the next following note, has much to commend it and deals with a very different problem from the present one of choosing between two persons, each of whom could sue if the other could not. This dissent reiterates the views which the learned judge expressed in *Kirkham* v. *Boughey* [1958] 2 Q.B. at 342, where he preferred to ground a husband's right to recover for his wife's medical treatment, not upon his quasi-proprietary right to consortium, but upon his duty to provide proper maintenance for his wife. That duty, he emphasised, " is a legal duty and the liability of the tortfeasor does not extend to one who, however reasonable and commendable his actions or however close his relationship to the injured person, pays for medical treatment which he is under no legal duty to provide."

This concentration upon the husband's duty rather than his now unpopular " relational " right is itself an interesting development in the field of recovery for purely pecuniary loss (which would, for example, justify a parent's recovering medical expenses from one who injures a child too young to provide services, but which should perhaps lie in quasi-contract rather than tort), and it is reflected in the present case not only in the dissent from *Schneider* v. *Eisovitch*, but also in the reliance placed upon the

doctrine of necessaries, which arises out of this duty of maintenance. It is, however, unfortunate that liability in tort should become bedevilled in any way with the doctrine of necessaries with all the purely contractual questions which that doctrine involves, such as style of living and the like. For instance, the availability of National Health Service facilities must be disregarded in assessing the reasonableness of expenses in an action for damages for personal injuries, but might conceivably be relevant to the contractual question of necessaries.

Reliance on the doctrine was probably necessary, in the present state of the law, if the desired result was to be attained. But it is very much to be hoped that the Law Reform Committee will deal with the *Chant* v. *Read* situation and that the defendant in a case like this will be able to secure contribution from the husband, which is surely the proper way of safeguarding him. The underlying reason for *Gage* v. *King* will then have gone, yet ironically the decision may begin to give trouble. The husband will still be in most cases the *only* proper person to sue for the wife's medical expenses, so that he must presumably join as plaintiff in actions for personal injuries by the wife, even if he does not wish to make a consortium claim and is not otherwise involved. Furthermore, while the decision is designed to prevent husband and wife from having the benefit of *Mallet* v. *Dunn* [1949] 2 K.B. 180 both ways, as it were, it does mean that the wife's medical expenses are firmly within the scope of that decision, which allows a husband's consortium claim to escape reduction for any contributory negligence by the wife. *Mallet* v. *Dunn* is, of course, quite independent of the inability of one spouse to sue another in tort and may therefore possibly survive any recommendations on that subject.

A third point concerns motor insurance. One of the traps resulting from the preseat immunity of spouses is that the indemnity clause in respect of third party risks does not cover an injured spouse since no " liability " is incurred. Removal of the immunity would remove the pitfall, but presumably even then an injured wife will not be able to sue her husband-driver (and thus his insurers) for medical expenses, since the loss is his, not hers—unless she has had the foresight and legal knowledge to pledge her own credit to doctor and hospital, unlike Mrs. Gage and every other wife.

M. J. Prichard.

Damages—Nervous Shock—Volunteer's Expenses

Whether or not a woman who suffers nervous shock on hearing of the accidental death of her husband should be entitled to recover

damages from the person responsible for the accident is a difficult question of policy upon which different views may exist. Viewed in the light of common sense, however, it would not seem reasonable to allow the wife to recover for such shock if she happens to have been physically injured in the same accident and to refuse her a remedy in other cases. Nevertheless this is the result of Paull J.'s decision in *Schneider* v. *Eisovitch* [1960] 2 W.L.R. 169. The plaintiff and her husband were passengers in the defendant's car when it was involved in an accident through the defendant's negligence. The husband was killed, but at the time of the accident the plaintiff did not know this as she was herself rendered unconscious. She recovered consciousness in hospital and was then told of her husband's death, whereupon she suffered shock. Paull J. held that she could recover damages for this shock as well as for her own physical injuries.

The learned judge's reasoning seems simplicity itself. A breach of duty to the plaintiff was established and if she had actually seen her husband killed she could certainly have recovered for the resultant shock. She did not see him killed because she was unconscious, but the news of his death which was conveyed to her later " was a consequence which flowed directly from the breach of duty to the plaintiff," and she could therefore recover on the principle of *Re Polemis* [1921] 3 K.B. 560. With respect, however, this is to oversimplify the case.

It is true that the defendant's negligent driving constituted a breach of duty to the plaintiff and it is true that the negligent driving caused the news of her husband's death to reach the plaintiff. The negligent driving, however, constituted a breach of duty not only to the plaintiff, but also to her husband, and it was that breach which caused the news of his death to reach her because it was that breach which caused his death. The news of the death would have reached the plaintiff whether or not she had happened to be a passenger in the car. It is submitted, therefore, that Paull J. was wrong to hold that the plaintiff's presence in the car made all the difference. Since she did not see her husband killed but only heard afterwards about his death, the case, so far as shock was concerned, was the same as if she had not been there at all.

It may be asked, however, why a distinction should be taken between seeing an accident and hearing about it afterwards. There is in fact authority for such a distinction in *Hambrook* v. *Stokes Bros.* [1925] 1 K.B. 141, but in any case it seems to serve a useful purpose as one means of drawing a line in cases of nervous shock. In the case of physical injury the normal criterion of duty founded upon foreseeability serves to limit adequately the range of potential

plaintiffs, for physical injury to a person removed from the scene of the accident in time and space cannot be foreseen. The same is not true, however, for shock. If I run over and kill a small boy I can foresee that the boy has a mother, that the mother will be informed and that she may well suffer shock. The straightforward application of foreseeability to shock cases would, therefore, enable persons removed in time and space from the scene of the accident to recover. This, probably, would be to open the field too wide. At all events, *Bourhill* v. *Young* [1942] A.C. 92 and *King* v. *Phillips* [1953] 1 Q.B. 429 show that the courts are not prepared to extend the remedy so far.

King v. *Phillips*, in fact, indicates that the courts are not prepared to grant a remedy even to all those persons who actually witness the accident, and it has been suggested that only those persons who are within the range of foreseeable physical injury can recover for nervous shock. This may be too narrow, but is it unreasonable to hold that persons who do not even witness an accident but only hear about it afterwards should not be entitled to recover? It is to be hoped that *Schneider* v. *Eisovitch* will not be regarded as an authority to the contrary, even if it should ever occur again that the plaintiff is physically present at the accident but in no condition to suffer shock there and then.

In the same case Paull J. had also to decide an interesting point on the measure of damages. The accident occurred in France, and as soon as they heard of it the plaintiff's brother-in-law and his wife—Mr. and Mrs. Taylor—flew out to assist the plaintiff in the task of conveying herself and her husband's body back to England. As Paull J. found, " if Mr. and Mrs. Taylor had not flown out on their own initiative, either the plaintiff would have telegraphed asking them to come, or, alternatively, the plaintiff would have had to make arrangements for a nurse to accompany her home and also to employ somebody to see about the arrangements for transporting the coffin to England." The Taylors incurred out-of-pocket expenses amounting to £110, and the question was whether the plaintiff could recover that sum as part of her damages in order to reimburse them.

Paull J.'s decision that these expenses could be recovered provides a useful new principle. The plaintiff was under no legal obligation to reimburse the Taylors (if she had been, the expenses would clearly have been recoverable) and Paull J. did not rely upon her moral obligation to do so. Instead he laid down three conditions which must be fulfilled if expenses of this kind are to be recovered and which, he held, were fulfilled in the present case. A plaintiff cannot claim a sum of money because he would like to

reimburse a friend for his services, but he can claim the friend's out-of-pocket expenses if (1) the services rendered were reasonably necessary as a consequence of the defendant's tort; (2) the out-of-pocket expenses were themselves reasonable in the circumstances (including whether expenses would have been incurred if the friend had not assisted) and (3) the plaintiff undertakes to pay the sum awarded to the friend.

Apart from a doubt as to the nature and enforceability of the undertaking under (3), this is unexceptionable and the result is both convenient and just. It is convenient because the opposite conclusion would tend to discourage people from freely rendering assistance to injured persons unless they first received a request from which a promise to pay could be implied. It is just because the services rendered were truly substitutes for services the cost of which would plainly have been recoverable from the defendant. (The reasoning here is not wholly unlike that of Devlin J. in *McNeill* v. *Johnstone* [1958] 1 W.L.R. 888, where he held that a husband who suffers loss of earnings as an alternative to loss of the consortium of his wife following an injury to her, can recover for that loss of earnings.) Furthermore, if the plaintiff had actually contracted for the services their cost would have included an element of profit to the person rendering the services, and this too the defendant would have had to pay. In the event he was only liable for the out-of-pocket expenses.

Nevertheless, in view of the absence of any legal liability on the part of the plaintiff to reimburse the Taylors, Paull J.'s decision undoubtedly breaks new ground, and cannot yet be regarded as definitely part of the law. In *Gage* v. *King* [1960] 3 W.L.R. 460 (see preceding note), on very different facts, Diplock J. found it necessary to express his dissent from Paull J.'s decision in the present case and, indeed, held it to be contrary to *Allen* v. *Waters & Co.* [1935] 1 K.B. 200, a case upon which Paull J. himself relied. The *ratio decidendi* of that case is, however, sufficiently obscure to prevent its being binding on the point now at issue, and it is respectfully submitted that on general grounds the decision of Paull J. is to be preferred.

J. A. Jolowicz.

DAMAGES—INDUSTRIAL DISABLEMENT GRATUITY—STATUTE LAW?

Hultquist v. *Universal Pattern and Precision Engineering Co.* [1960] 2 W.L.R. 886 could, perhaps, be taken by adherents to the so called Realist School of jurisprudence to lend support to the view that even statutes are not law, at least until made the basis of an authoritative judicial decision. The point of the case, a technical

one concerning the application of section 2 of the Law Reform (Personal Injuries) Act, 1948, had come before the High Court on no less than six occasions (*Hultquist's* case being the sixth) and the decisions had been equally divided between two different solutions. Yet, as the Court of Appeal observed in the present case, the question which had given rise to so much controversy had been anticipated and provided for in the statute itself (s. 2 (6) (*c*)) so that, had that provision been read in the earlier cases there could have been little, if any, doubt. Today, presumably, the law is settled, but is it Parliament or the Court of Appeal which has settled it?

The point itself, though technical, is of considerable importance to the assessment of damages in personal injury cases. The Act of 1948 requires that there be taken into account against the damages awarded for loss of earnings or profits one-half of the value of any rights which accrue to the injured person in respect of various National Insurance benefits " for the five years beginning with the time when the cause of action accrued." Where the benefit consists of periodical payments there is no particular difficulty in making the required calculation, but in the case of minor but permanent disabilities the benefit takes the form of an " industrial disablement gratuity." This is a lump sum, generally awarded " for life," and thus the injured person in receipt of a gratuity will in fact receive the entire sum during the five-year period although the payment will have been made in respect of his whole life. Should there, then, be taken into account one-half of the whole amount of the gratuity or only one-half of such proportion of the gratuity as the five-year period bears to the injured person's expectation of life? If the problem is treated as *res integra*, arguments can be found in favour of either solution; but the matter is settled by the Act of 1948 itself. Section 2 (6) (*c*) provides that " an industrial disablement gratuity shall be treated as benefit for the period taken into account by the assessment of the extent of the disablement in respect of which it is payable," and the second solution is therefore correct. Whether or not this is the better solution is beside the point, for the words of the statute, though not easy to understand, are unambiguous. It is a little alarming that they should have taken so long to acquire the force of law.

J. A. Jolowicz.

DAMAGES—PROSPECTIVE LOSS OF EARNINGS—REDUCED EXPECTATION OF LIFE

In *Pope* v. *D. Murphy & Son Ltd.* [1960] 2 W.L.R. 861, as in the earlier case of *Harris* v. *Brights Asphalt Contractors Ltd.* [1953] 1

Q.B. 617, the problem was to determine the measure of damages to be awarded to a plaintiff whose working life has been reduced as a result of his injuries. Should the damages for prospective loss of earnings be calculated by reference only to the period of life actually left to the plaintiff or by reference to the whole period during which he could have expected to work had the accident not occurred? In *Harris'* case Slade J. chose the former solution, but his decision was criticised by Kemp and Kemp, *The Quantum of Damages in Personal Injury Claims*, p. 78 *et seq.*; and in *Pope* v. *Murphy* Streatfeild J., who thought the criticism was justified, reached the opposite conclusion.

Viewed simply as a decision concerning a living plaintiff Streatfeild J.'s solution has much to commend it. The defendant was responsible for reducing the plaintiff's expectation of life and, though damages for that reduction could be and were awarded, they contain no element of compensation for pecuniary loss (*Benham* v. *Gambling* [1941] A.C. 157). Unless, therefore, damages for prospective loss of earnings are awarded upon the basis of the plaintiff's estimated working life as it was before the injury, the defendant benefits from the damage he has caused. As Streatfeild J. held, what the plaintiff had lost—and lost there and then—was the ability to earn £x per year over the period during which he might have expected to earn it. Moreover, though it is necessary in assessing the length of that period to have regard to the possibility of the plaintiff's early death or disablement through some extraneous cause, it is quite another thing to take into account the changes and chances of life brought about by the very accident which is the subject of the proceedings.

The loss of a man's earnings which results from his accelerated death is, in reality, more of a loss to his dependants than to him, but when viewed from the point of view of the dependants *Pope* v. *Murphy* is still to be preferred. Because the plaintiff had succeeded in his action, any proceedings under the Fatal Accidents Acts on the dependants' behalf were out of the question. On the basis of *Harris'* case, therefore, they would have had nothing to compensate them for the loss of their breadwinner. Under *Pope* v. *Murphy*, on the other hand, they have at least a reasonable expectation that the plaintiff will make provision for them after his death out of the damages he recovers.

The difficulty is, however, that the reasoning of *Pope* v. *Murphy* applies equally to those cases where the victim of the accident dies before he can bring his action and where, therefore, claims under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, will exist. If *Pope* v. *Murphy* is correct,

damages for loss of earnings calculated by reference to the deceased's pre-accident expectation of working life should be awarded to his estate under the Act of 1934.

So far as is known this has never in fact been done, nor is it desirable that it should be done. Whatever the logic of *Rose* v. *Ford* [1937] A.C. 826 and similar cases, the notion of awarding damages to a deceased person's estate in respect of the tort which killed him is merely fanciful so long as the Fatal Accidents Acts remain on the statute book. The loss is not that of the deceased but of his dependants, and those Acts provide the proper medium for the award of damages. It is to be observed, moreover, that damages under the Fatal Accidents Acts are calculated by reference to what the deceased would have earned if he had lived: see, especially, *Davies* v. *Powell Duffryn Associated Collieries* [1942] A.C. 601, at p. 617, *per* Lord Wright.

It is true that in some cases the persons entitled to a deceased person's estate are not the same as his dependants—though such cases must, in practice, be unusual—so that under *Pope* v. *Murphy* the beneficiaries may be said to recover for a loss for which the Fatal Accidents Acts will not compensate them. But in such cases there would be a danger of awarding damages twice over: once to the dependants under the Fatal Accidents Acts and once to the estate, and thus to the beneficiaries, under the Act of 1934. (This cannot happen where the beneficiaries and the dependants are the same, because of the rule that in assessing damages under the Fatal Accidents Acts any benefits which result from the death—statutory exceptions apart—must be taken into account.)

In other words the position seems to be this. By virtue of the provisions of the Act of 1934, the law is to all intents and purposes the same whether the victim of the accident is alive or dead. Yet *Pope* v. *Murphy* provides the better rule for those cases in which the victim survives for long enough to bring his action, while *Harris's* case provides the better rule where he does not.

Two alternative solutions suggest themselves. The first, and this would probably be the better in theory, would be to distinguish more clearly than at present between a man's own interest in his future earnings, which ceases on his death, and the interest of his dependants, which does not. As the cases stand at present, where the victim of an accident is already dead the practice is to award damages for loss of earnings up to the date of death to the estate, and to take the future losses into account under the Fatal Accidents Acts. This practice recognises that the loss of a man's earnings after his death concerns the dependants and not the man himself. In theory the same should be done where the victim is still alive

at the date of the trial but will be dead shortly thereafter. To make a remedy under the Fatal Accidents Acts available to the dependants of a still living person, however, is almost certainly impracticable, and the other solution is much easier of achievement. It is simply to forget—as, if it may be said with respect, Streatfeild J. possibly did forget—that the damages recoverable by a deceased person's estate are the same as those which would be recoverable by the victim of the accident himself if he were still alive. In other words *Pope* v. *Murphy* should be restricted to those cases where the plaintiff is the victim of the accident himself and not applied in those where the victim is dead and the action brought by his personal representative. This, as has been suggested, is wrong in law, but it will not be the first time that a mistaken view of the law has provided the correct solution.

There is just one point of a rather more detailed kind which should be added. Although the report of *Pope* v. *Murphy* omits the learned judge's consideration of the figures, it does appear that he thought that the same rate of earning should be used as the basis of the calculation both for the years during which the plaintiff would continue to live and for the years after his death. This, with respect, seems to be wrong, for a dead man has no personal expenses. It is right to give the plaintiff his full rate of earning for his remaining years of life; but should not a deduction be made for the period after his death, that deduction to be calculated by reference to the plaintiff's personal living expenses? If this is not done the plaintiff's estate will profit handsomely by his death.

J. A. Jolowicz.

NUISANCE—INTIMIDATION—PICKETING IN A TRADE DISPUTE

Modern British labour law is very largely the creature of Liberal victory in the election of 1906. The Trade Disputes Act of that year set the tone of twentieth-century British practice, of which the central tradition has been to keep industrial conflict, where there is a " trade dispute," out of the ordinary courts so that a settlement can be negotiated rather than imposed by law. Thus acts done in furtherance or contemplation of trade disputes are specially protected—*e.g.*, a combination is not an actionable conspiracy unless the acts done are unlawful in themselves (Trade Disputes Act, 1906, s. 1); " peaceful picketing " by attending at or near any place is legalised (s. 2); and inducing breach of a contract of employment is not tortious (s. 3). The scope of these protections is widened by section 5 which defines " trade dispute " as meaning " any dispute between employers and workmen or between

workmen and workmen " connected with the employment, non-employment, terms of employment or conditions of labour of " any person." It is interesting to see these provisions of the 1906 Act reappearing in a substantially similar form in modern West Indian labour legislation to which the Privy Council adverted in *Bird* v. *O'Neal* [1960] 3 W.L.R. 584.

The case arose from a strike in the Leeward Islands caused by the dismissal by the respondents of Miss Winter, a clerk at their drug store. They refused to give reasons to her or to her trade union, and a dispute thereupon arose. The Governor appointed a board of inquiry, as he was statutorily empowered to do if there were a " trade dispute." The respondents claimed that no such dispute existed and later refused to recognise the board's award. The executive committee of the union had resolved that the secretary, H., should take steps to picket the drug store; and H. and J. (a committee member) thereupon engaged six paid pickets, of whom the leader was S. J. and S., however, led the pickets with excessive zeal. They arrived, for example, on one morning with a steel band and a large crowd, shouted and paraded outside the shop, and intimidated would-be customers with threats of violence, menaces and coercion. The respondents brought an action against all the committee members and S. The trial judge awarded damages for nuisance; and the Privy Council upheld this award against two only of the defendants, J. and S., in a judgment which touches upon four interesting questions.

(i) First, they held that there was a trade dispute in existence. Such a dispute, contrary to the respondents' contention, could arise out of the clerk's dismissal even if it were a lawful dismissal. Also, their Lordships reaffirmed the view that such a dispute can arise where the employer is in dispute only with the union, even though (as here) none of the other employees were members of the union. The union can act as spokesman for the workman with whom the employer is in dispute. Furthermore, it was held that " workmen " must here be given a wide and liberal interpretation which should include shop assistants. Although the definition in the Leeward Islands legislation is not the same as that in section 5 of the English Act of 1906 (which merely states that " workmen " means all persons employed in trade or industry), the approach adopted by their Lordships supports a wide and liberal view there, too, and strengthens the hand of those who wish to argue that recent narrow Irish interpretations should not be followed in this country (*e.g.*, *British and Irish Steampacket* v. *Branigan* [1958] I.R. 128). In another context English courts have already given a liberal meaning to " trade " (*National Association of Local Government*

Officers v. *Bolton Corporation* [1943] A.C. 166 at p. 184); and the present decision is a welcome pointer in the same direction.

(ii) The courts below, however, had found that the pickets had committed unlawful acts and that the union committee was vicariously liable for those acts. The Privy Council rejected the view that the pickets were the servants of the committee members. They had been engaged by the trade union (acting by its agents H. and J.) and in accordance with general principle the committee members were not individually the masters of the pickets. So, a general manager of a company might have authority to engage, dismiss and control workmen, but the workmen did not therefore become his servants rather than the company's.

This welcome equivalence of companies and trade unions fits English law very well where the trade union is registered. Here, after *Bonsor* v. *Musicians Union* [1956] A.C. 104, we can be fairly sure that the union possesses sufficiently the marks of a " legal entity " to stand as a separate master. But where a trade union is unregistered it remains, in English law, a wholly unincorporated association. The English law of tort is notoriously short of weapons with which to tackle the problems of such associations. The only alternatives which seem to be available are that the agents (here the pickets) should be held to be the agents either of the committee personally (as in *Brown* v. *Lewis* (1896) 12 T.L.R. 455) or of the entire membership (as in *Campbell* v. *Thompson* [1953] 1 Q.B. 445). If so, this is only one further illustration of the curiosities caused by their Lordships' ascribing, in *Bonsor's* case, to the registered union a far greater degree of legal " personality " than section 6 of the Trade Union Act, 1871, seems to require, and of the odd disparity thereby created between registered and unregistered unions.

(iii) Having put aside vicarious liability, their Lordships were unwilling to re-examine the facts to see whether any of the appellants were liable for conspiracy individually rather than vicariously; but they considered that such a liability might well have been established had the matter been considered from that point of view. In saying this they indicate that each incident would have to be examined to ascertain whether the part played by the particular defendant compelled the inference that he was " party to a conspiracy to use unlawful means " to further the picketing. In saying this, their Lordships seem to adopt the view that in order to determine whether a party is one of a " combination " in a conspiracy, his subjective mental state is to be examined. This approach was also adopted recently in *Huntley* v. *Thornton* [1957] 1 W.L.R. 321. There, the two union officials who were ignorant

of the true state of the facts were held not to be *parties* to the conspiracy, because they intended still to further union interests rather than hound the plaintiff, even though they had joined in the plan to prevent his employment. It is to be noticed that this approach is materially different from one which tests the fact of combination objectively and then asks: "What is the predominant motive of the combination—injury to the plaintiff or pursuit of legitimate interests?" The adoption of the subjective approach is much more readily understood where some of the alleged parties have acted in ignorance of relevant facts. Otherwise, the *Crofters' Case* [1942] A.C. 435 may be thought to indicate the more objective test.

(iv) The unlawful acts committed by the pickets consisted in threats of violence and the like. *Bird v. O'Neal* constitutes, therefore, one of the very few modern illustrations of the tort of "intimidation," where the tort consists in the threat to do unlawful acts. The Privy Council, unhappily, did not confine the liability of J. and S. to the tort of intimidation, but went on to find that the picketing constituted an actionable nuisance for which they, as individual participants, must be held responsible. There is no doubt that to surround a drug store with a shouting horde of pickets and a steel band would normally constitute a nuisance. But their Lordships do not discuss, although they cite, the Leeward Islands equivalent of the Trade Disputes Act, 1906, s. 2, whereby it is made lawful for one or more persons in furtherance of a trade dispute to attend at a place "merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working." The pickets were certainly trying to impart information. Most of their shouts were "Don't buy from O'Neal's." Indeed, if the picketing remains peaceful, it is submitted that what would ordinarily be trespass or nuisance is protected by this section to the extent that it is necessary to effect that picketing, e.g., a crowd of pickets on the highway does not necessarily become a public nuisance (see Citrine, *Trade Union Law*, 2nd ed., pp. 449–451). By disregarding this statutory provision, the Privy Council suggests that a shouting crowd of pickets is in itself necessarily an actionable nuisance, trade dispute or no trade dispute. It is suggested that, since the defendants were clearly acting in furtherance of the trade dispute, the liability imposed upon J. and S. is justifiable only because their picketing went beyond the terms of the special protection, involving them in the tort of intimidation, and therefore in acts which

far from peaceful and which were directed at objects rather different from those envisaged by the section.

K. W. WEDDERBURN.

TRUST—TRUST FOR SALE WITH POWER TO POSTPONE—COURT'S DISCRETION TO ORDER SALE

WHEN several trustees hold property upon trust for sale but with a power to postpone sale, it is commonly said that they must sell unless *all* of them agree to postpone; for a mere power ordinarily requires unanimity: *Re Hilton* [1909] 2 Ch. 548, 551. This means, on the face of it, that any one of the several trustees can compel a sale against the wishes of his colleagues.

Jones v. *Challenger* [1960] 2 W.L.R. 695 (C.A.) is a reminder that the above statements go too far. The only method by which a trustee who wishes to sell can compel his colleagues is by obtaining an order of the court; and such an order, like other equitable relief, is discretionary. He will fail, for instance, if he does not come " with clean hands," or indeed whenever the circumstances are such that it would be inequitable for him to insist upon a sale. And, of course, such objections as these are especially likely to arise where the trustee is also one of the beneficiaries under the trust and so may be thought to be prompted by motives of self-interest.

Since 1925, probably the most common case in which trustees for sale with a power to postpone are also the beneficiaries occurs where there is co-ownership of land; for there, even if the document which creates the co-ownership does not itself give the trusteeship to the co-owners, the provisions of the Property Acts may do so. So it happens that the cases in which the courts have formulated their modern doctrine about the trustee for sale who wants to force a sale have been cases of co-ownership of land. The first of them was *Re Buchanan-Wollaston's Conveyance* [1939] Ch. 738 (C.A.), where four neighbouring householders, seeking thereby to maintain the values and amenities of their respective houses, jointly bought a piece of land which lay between their houses and the sea, and covenanted together in effect that it should not be sold without the consent of all of them. In law, their joint ownership of this land made them trustees for sale with power to postpone sale: Law of Property Act, 1925, s. 36. Ten years later, one of them, having sold his house and left the district, applied to the court for an order that the land be sold. The others objected that such an order would be inequitable, for it would enable him to escape from his covenant. The Court of Appeal held accordingly that, in the circumstances, it would not be " right and proper " to order a sale.

In this type of case, it was said (at p. 747), the court must decide whether, in the particular circumstances, " the person applying for execution of the trust for sale is a person whose voice should be allowed to prevail."

Next came *Re Mayo* [1943] Ch. 302, where the trust for sale was imposed by section 36 of the Settled Land Act, 1925. That was a straightforward case in which (*per* Simonds J.) there was " no suggestion of *mala fides*." So there the trustee-beneficiary who sought an order for sale, against the wishes of the other trustees, was successful. Next came *Re Hyde's Conveyance* (1952) 102 L.J. 58, where Danckwerts J. dismissed a like application for a sale, holding that the applicant was actuated by spite and was seeking to defeat the purpose for which he and his brother (the other trustee for sale) had acquired the land. Then followed a decision of Upjohn J. (*Stevens* v. *Hutchinson* [1953] Ch. 299) and a dictum by Denning L.J. (in *Bull* v. *Bull* [1955] 1 Q.B. 234 (C.A.), at pp. 238–239), each of them explicable—see *Jones* v. *Challenger*, *supra*, at pp. 699–700—on the assumption that the court will not order trustees for sale to sell if that would defeat the " object behind the trust "—in the one case a matrimonial home and in the other a home for mother and son.

In *Jones* v. *Challenger*, *supra*, the leading judgment was delivered by Devlin L.J. (Ormerod L.J. concurring), and his Lordship's task was to expound and apply in the light of the intervening cases the " right and proper " test which the Court of Appeal had formulated in the *Buchanan-Wollaston* case twenty-one years previously. He did so as follows (at p. 698): " where the trust itself or the circumstances in which it was made show that there was a secondary or collateral object besides that of sale . . . it is . . . wrong and inequitable for one of the parties to the trust to invoke the letter of the trust in order to defeat one of its purposes . . . and the court will not permit it." This test, be it noted, is narrower and more specific than the vague moral overtones of the old maxim about " clean hands."

The facts in *Jones* v. *Challenger* were these. Four years ago, when defendant and plaintiff were husband and wife, they had bought a leasehold dwelling-house which had only ten years to run, each of them contributing one-half of the price. It was conveyed to them upon trust for sale, with power to postpone sale, upon trust for themselves as joint tenants. For a while they occupied the house as their matrimonial home; but, in 1959, the husband obtained a decree absolute of divorce and the wife (who had meanwhile left the house) remarried. She thereupon pressed for a sale of the house, desiring the cash value of her half share; h

husband (her co-trustee for sale) declined, wishing to continue living there. In the county court the judge dismissed her application for an order that the house be sold, holding that at present (and *semble* until the husband remarried) it would not be reasonable to deprive the husband of his home. That was the wrong test to apply, said Devlin L.J. in the Court of Appeal: their special purpose in acquiring the house (on trust for sale) was for their joint occupation as their matrimonial home; and that purpose ended when their marriage ended and so has become irrelevant. Accordingly, the ordinary rule, that there must be a sale if trustees for sale do not unanimously desire to postpone sale, now applies; and the reasons for the ending of the marriage, or the rights and of that matter, are immaterial. The collateral purpose the trust for sale having gone, only its primary inherent —dividing its proceeds among its beneficiaries—remains. it was not inequitable for the wife, once the marriage had ended, to seek to realise her share of their investment. (Seemingly, indeed, it was inequitable of the husband to resist a sale in order to secure exclusive enjoyment (rent free) for himself whilst the market value of that very short lease was rapidly declining to nothing.)

In conclusion it should be noted that *Jones* v. *Challenger*, like most of the recent cases, was an application made under section 30 of the Law of Property Act, 1925, whereby " If the trustees for sale refuse to sell . . . the court may make such order as it thinks fit." On this ground, Donovan J. (dissenting) held that the county court judge had a complete discretion which, in so far as he had duly exercised it, should not be interfered with. Contrast the *Buchanan-Wollaston* case, *supra*, at p. 746, where the Court of Appeal had held that the court's power to order a sale under section 30 is subject to the same limiting principles as apply to its ordinary inherent powers of enforcing a trust.

S. J. Bailey.

CONFLICT OF LAWS—DEBT—FOREIGN STATUTE—PROPER LAW

In 1927, the National Mortgage Bank of Greece floated a loan of mortgage bonds expressed in pounds sterling, and the National Bank of Greece guaranteed the payment of principal and interest. The two banks were incorporated in Greece, and the loan was governed by English law. In 1949 Greek legislation introduced a moratorium in respect of the obligations arising from the bonds. On February 18, 1953, a Greek law (No. 2292), authorising the amalgamation or merger of banking companies, provided that a

company which absorbed another by merger, or the new company formed by the amalgamation, " becomes the universal successor to the rights and obligations in general of the amalgamated companies without any further formality or act whatsoever." On February 27, 1953, the guarantor and another Greek company, the Bank of Athens, were amalgamated to form a new company, the National Bank of Greece and Athens S.A. On July 12, 1956, Sellers J. held in *Metliss* v. *National Bank of Greece and Athens S.A.* (affirmed, [1957] 2 Q.B. 33 (C.A.); [1958] A.C. 509 (H.L.)) that the defendants were liable for all the debts of the former National Bank of Greece, and that the moratorium did not affect the obligations of the defendants arising out of the bonds, since these were governed by English law. On July 16, 1956, Law No. 2292 was modified by the Legislative Decree No. 3504 which provided with retroactive effect that a company absorbing another by amalgamation or a new company formed by the amalgamation became " the universal successor to the rights and obligations of the companies amalgamated, except for the obligations to which such companies were liable . . . payable in . . . foreign currency . . .; the new company . . . shall not be deemed . . . to be the successor to the above obligations. . . ." Relying on Decree No. 3504 the defendants, as successors of the guarantors, refused payment, and the plaintiff sued in England. It was common ground that the status of the corporation was governed by Greek law and that the contractual obligations were subject to English law. In *Adams* v. *National Bank of Greece and Athens S.A.* [1960] 3 W.L.R. 8 the House of Lords held that the defendants could not rely on the retroactive and liberating effect of the Greek Decree No. 3504, since the discharge of an obligation was governed by the proper law of the contract, which was English.

The decision rests on the characterisation of the Greek Decree No. 3504 as affecting obligations but not the status of the debtor. However, the question is more complex. A law relieving a debtor of his obligations may do so by discharging him of his liabilities. Alternatively it may deprive him of his capacity to contract. Finally it may destroy either entirely or *pro tanto* his legal personality as a subject of law clothed with rights and duties. The Decree No. 3504 purported to effect the last, by diminishing the company's statutory liabilities *pro tanto* without touching the substance of the debt. Since the legal personality of a corporation, its powers and duties, are governed by the law of its incorporation, it would seem, at first sight, that Greek law must determine the issue. This was also the view of the Court of Appeal, [1960] 1 Q.B. 6 Yet it must not be overlooked that not only a problem of choi

law, but also one of inter-temporal law was involved. Did Greek law apply as it stood in 1953, or does a reference to Greek law include all subsequent Greek legislation, which, incidentally, may purport to operate retroactively? English practice does not provide any clear-cut solution, but it appears that any subsequent legislation, whether having retroactive effect or not, will be applied unless it would be inconvenient or unjust (see F. A. Mann in 31 *British Yearbook of International Law* (1954) 217, at p. 232). This vague test conceals a clear policy to maintain transactions aiming at a permanent effect which were carried out in reliance upon their validity. To this end any subsequent validating legislation will be applied and any subsequent invalidating legislation will be disregarded. It follows that subsequent legislation should not be applied if the situation envisaged by it has ceased to exist and there are no facts on which the fiction can fasten, *i.e.*, if there does not exist a supplementary connecting factor, to use the terminology coined by Wengler (*Zeitschrift für ausländisches und internationales Privatrecht*, 23 (1958), 535). The test is whether a legal situation is continuing or has spent itself. If this analysis is adopted, the conclusions reached by their Lordships must be approved, albeit for reasons which differ somewhat from those given by the majority. In so far as Greek law was applicable to determine the existence, powers and duties and the extinction of the defendants, it was Greek law in force in 1953. Of course, for the purpose of any further merger or the extinction of the defendants, any subsequent modifications of Greek law remained relevant, since with regard to these aspects of the defendant corporation the situation was continuing. However, the substitution of one debtor for another was an occurrence which had spent itself. Any attempt to introduce subsequent legislation to relieve the debtor on the pretext that it modified the status of the defendants by abolishing their liability was merely a legal disguise for confiscatory legislation affecting property of creditors, since in reality it struck at the debt and not at the defendants' legal personality. The debt, while representing a continuous situation subject to any subsequent modifications of the law which governs it, was, however, subject to English law, and its *situs*, the law of which determines the validity of confiscatory measures, was also English.

K. Lipstein.

CONFLICT OF LAWS—FOREIGN DEBT—DATE OF CONVERSION INTO STERLING

The complicated case of *Re United Railways of the Havana Ltd.* [1960] Ch. 52 yielded a number of broad problems of private international law which received full consideration by the Court of

Appeal (see [1959] C.L.J. 147). Their decision has now been reversed in part by the House of Lords, *sub nom. Tomkinson* v. *First Pennsylvania Banking and Trust Co.* [1960] 2 W.L.R. 969, but none of the principles which they formulated were questioned.

The House had no hesitation in applying the same test to ascertain the proper law of the lease, and in agreeing with the majority's conclusion that this was the law of Pennsylvania. The railway company's liability under the lease had not therefore been discharged by the Cuban legislation and the only question remaining was how much the trust company could claim against its liquidator.

It was on this relatively narrow point that their Lordships' speeches were mainly concentrated, and on this that, with on dissentient, they differed from the majority below. The diffic lay partly in the interpretation of the proof which the trust company had lodged (Viscount Simonds had never before seen " so confused and confusing a document "); partly in the effect on that proof of an order made by Roxburgh J.; and partly in a problem of more general interest—the date at which the claim should be converted from dollars into sterling.

Clear it was that this must be in sterling; and clear it was as well that the date for converting to sterling a claim for damages for breach of contract or for tort was that of the breach or commission of the tort. But what of a claim for a debt in foreign currency? Here, it was argued, the date should be that of judgment, or at earliest, of initiation of proceedings. However, like the Court of Appeal, the House declined to draw any distinction: a claim for a foreign debt fell within the general rule and must be converted when the debt became payable. Viscount Simonds relied strongly on *Ward* v. *Kidswin* (1626) Lat. 77, where it was held that a plaintiff suing on a bond to pay " Hamburgh money " had correctly pleaded " detinet " alone, not " debet et detinet " (though the action was nonetheless in debt). Lord Denning pointed out that a claim for a non-sterling debt must of necessity be for damages for breach of contract rather than for a debt.

Simplicity is gained by rejection of a separate conversion rule for actions for a foreign debt. Yet the result is not entirely satisfactory. As Lord Radcliffe showed (at p. 1002) the effect of the general rule is to express the creditor's rights in terms of sterling at a date earlier than that on which he can obtain the sterling and reconvert it into the currency due; and the debtor is thereby given a valuable option to make or withhold payment according to the direction in which he anticipates the exchange rate to move. Might it not therefore be appropriate to give the creditor an option

to have his claim converted either at the date of breach or of initiation of proceedings? Such a rule was suggested by Lord Radcliffe but rejected because he found the problem "mainly theoretical"; for the creditor can effectively defer the date of conversion by proceeding to judgment in the foreign country, as that judgment will be converted into sterling at the date it was given when he enforces it in this country. The difficulty remains, however, that if for any reason the creditor cannot obtain judgment abroad, a violent fluctuation in the exchange rate may, under the present rule, cause him serious loss.

J. C. Hall.

THE ENFORCEMENT OF MORALS

EUGENE V. ROSTOW *

THERE may be a point in reviewing the controversy occasioned by Lord Justice Devlin's Maccabaean lecture [1] from an American point of vantage. For the Justice's brilliant and original paper has been heatedly attacked as "illiberal." In the popular sport of classifying all positions on all subjects as either Liberal or Conservative—and the sport is quite as popular in the United States as it is in other countries—there is an intriguing difference between the rules of the game as it is conventionally played on the opposite sides of the Atlantic. In Great Britain, the suggestion that law has a moral content seems to raise theocratic ghosts in many quarters, perhaps in most; and clearly, theocracy is "Conservative." In the United States, however, it is just the other way around. Every American schoolboy—or at least every American law student—considers Austinian positivism, and the strict separation of law and morals, to be certain hallmarks of a position labelled "Conservative," "Rigidly Technical," "Reactionary," or worse. And the view of law as an instrument for carrying out the moral purposes of its own tradition, and those of the society it rules, is a familiar touchstone of orthodox "Liberalism."

Since the debate occasioned by Sir Patrick's lecture, like all such controversies, has become somewhat confused, I shall attempt to summarise his argument before taking up the criticisms which have been addressed to it.

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This paper evolved in response to the stimulus of invitations to talk under the auspices of Undergraduate Societies and Faculties of Law at several British universities during the academical year 1959–60, and was given as a lecture at King's College, London, on March 14, 1960. I am grateful to my hosts on those agreeable occasions for their kindly pressure to prepare the successive drafts of the paper, and for their helpful criticisms of it, particularly those of the members of the Political Society, King's College, Cambridge, and of Prof. Hart and his other guests at a most stimulating lunch at University College, Oxford.

[1] "The Enforcement of Morals," the Maccabaean lecture in Jurisprudence of the British Academy, 1959 (Oxford University Press, 1959); Prof. H. L. A. Hart, "Immorality and Treason," *The Listener*, July 30, 1959, pp. 162–163; Richard Wollheim, "Crime, Sin and Mr. Justice Devlin," *Encounter*, November 1959, pp. 34–40. I shall refer hereafter to these three documents as "Devlin," "Hart" and "Wollheim."

I

Sir Patrick Devlin's lecture plucked extremely sensitive nerves. His point of departure was the Wolfenden Report on Homosexual Offences and Prostitution, in itself a subject to stir deep feeling. As a judge, he scrupulously refrained from taking a position on the recommendations of the Wolfenden Report, beyond some guarded words of sympathy for its point of view, and of praise for its value as a carefully reasoned and dispassionate study of its theme.[2] His lecture was addressed to the jurisprudential premise of the Report—the proposition that it is not the business of the law to take positions on matters of morals, or to intervene in the private lives of citizens, save in so far as it may be necessary "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."[3]

The distinction between crime and sin implied by this passage in the Wolfenden Report has strong support. Those who accept it would define sin as an offence against the moral law, crime as an offence against rules enacted to protect public order, to prevent injury to others, or to safeguard the young, the insane, women, animals or others who may be considered special wards of the law in a society of free and responsible men. For this purpose, there are three possible meanings of the term "moral law." It may denote the moral code of a religion. Or it may refer to a body of ideas we can identify as the accepted moral code of a community at any stage of its development—its prevailing mores, in effect. Finally, the term "moral law" may mean the moral decisions of each individual, spun out of his own conscience, or the view of morality taken by a selected group of philosophers. If these are the only three possible definitions of the words "moral law," the relevant one in this context is the second—the moral law as the embodiment of the moral ideas of a given community at a given time. In our secular Western societies, we have given up attempting to base law directly on religious principle, as we have given up requiring religion to be observed. Many would put great stress, as I should, on the moral responsibility of the individual, and on the contribution which philosophers of morality may make to thought and to life. But it would be anarchy to claim that society could tolerate the

[2] Devlin, pp. 2, 18, 19, 20, 21.
[3] *Ibid.*, p. 4.

" right " of an individual to act entirely in accordance with his own ideas of right and wrong, or even those of Socrates or Spinoza.

Can sin in this sense—as a violation of society's moral code—be distinguished from crime? Those who hold the principle expressed in the Wolfenden Report would say that a given act—murder, for example—may happen to be both a crime and a sin. That fact represents no more than coincidence, or what Professor Hart has called an " intersection " of crime and morals.[4] In the case of murder, such theorists of law would claim, the positive law and the moral law happen to cover the same area, but in pursuit of different objectives.

Lord Justice Devlin attacked this view with arguments of experience and arguments of logic. As a matter of history, he said, English law has never admitted so sharp a separation between law and morals, and as a judge he would find the duty of passing sentence almost intolerably difficult if it did.[5] In crimes of violence, he points out, the consent of the victim is not a defence. Nor may the victim end the prosecution after the event by forgiving his aggressor. The offence may have been committed most discreetly, without disturbing public order. If protecting the individual from unjustified injury inflicted by others were the only public interest at stake, his approval would remove any possible basis for public action. But it does not. A man incurably ill, or one afflicted with an overpowering sense of guilt, may beg to be killed. If a doctor or a friend yields to the plea, the act is murder nevertheless—not because it involves a breach of public order, but because it violates a moral principle about which society believes and feels strongly enough to insist upon its vindication, the principle which Dr. Glanville Williams has recently called the sanctity of life.

Having disproved the juristic theory of the Wolfenden Report, at least as an explanation of English law, Sir Patrick turned to the problem of defining the relationship between the positive and the moral law. Is it, he asks, a good theoretical relation, or a practical working alliance, or a bit of both? He sets out on his inquiry by asking himself three questions:

> " 1. Has society the right to pass judgment at all on matters of morals? Ought there, in other words, to be a public

[4] H. L. A. Hart, " Positivism and the Separation of Law and Morals," 71 Harv. L.R. 593, 598–599 (1958).

[5] Devlin, p. 6: " As a judge who administers the criminal law and who has often to pass sentence in a criminal court, I should feel handicapped in my task if I thought that I was addressing an audience which had no sense of sin or which thought of crime as something quite different. Ought one, for example, in passing sentence upon a female abortionist to treat her simply as if she were an unlicensed midwife? "

morality, or are morals always a matter for private judgment?

"2. If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?

"3. If so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?"[6]

A society possesses a public morality, Sir Patrick says, simply because it is a society. "What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals.[7]. . . [W]ithout shared ideas on politics, morals and ethics no society can exist. . . . For society is not something that is kept together physically; it is held by the invisible bonds of common thought."[8] A common morality is part of the "bondage" of society in this sense, and part of the price one pays for having society. No society can avoid having convictions and passing judgments on questions of morality deemed to concern society as a whole. A collective judgment on an issue of public morality is something more than a majority opinion, or even a unanimous opinion, that a man is doing wrong in what society considers to be his private affairs. There must first be a collective judgment that the matter affects the basic norms of the community's common life.

How can one tell what this common morality is? The metaphor Sir Patrick uses to explain his definition of the common morality is one of the most controversial features of his lecture. It is an illustration entirely natural to a common law judge, and peculiarly irritating to an academic philosopher. The collective moral judgment of a society, Lord Justice Devlin said, is in the final analysis symbolised, and expressed, by the actions of the men in the jury-box: twelve "right-minded" men, twelve men on the street, or the Clapham omnibus, drawn at random, and held to represent the moral views of the community at large. The standard of British law, he says, does not require the counting of heads in any direct or mechanical sense; it depends on opinions presumed to be held by a mythical but extremely useful creature known as "the reasonable man."

> "For my purpose I should like to call him the man in the jury-box, for the moral judgment of society must be something about which any twelve men or women drawn at random might

[6] *Ibid.*, p. 9.
[7] *Ibid.*, p. 10.
[8] *Ibid.*, pp. 11–12.

after discussion be expected to be unanimous. This was the standard the judges applied in the days before Parliament was as active as it is now and when they laid down rules of public policy. They did not think of themselves as making law but simply as stating principles which every right-minded person would accept as valid. It is what Pollock called 'practical morality,' which is based not on theological or philosophical foundations but 'in the mass of continuous experience half-consciously or unconsciously accumulated and embodied in the morality of common sense.' He called it also 'a certain way of thinking on questions of morality which we expect to find in a reasonable civilised man or a reasonable Englishman, taken at random.'[9]" [10]

At this point, Sir Patrick's exposition may be rather misleading, at least to a popular audience. While the jury is surely one medium through which the common morality of jury-using societies is expressed, the jury does not function alone. The judge charges the jury, comments on the evidence, and greatly influences the way in which the issues are presented to it for decision. Part of the respect with which judges are viewed derives from their role as appointed and independent spokesmen for the law of the community, and for its moral sense as embodied in its law. The jury does not always follow the judge in his view of the purpose of some part of the law. But it listens. Secondly, for all the vividness of Sir Patrick's definition, it is incomplete. Parliaments, borough councils, Royal Commissions, local and national bodies of many kinds, writers, teachers, leaders of thought, all function also as spokesmen of the common morality, as the jury does, distilling, expressing, applying and helping to shape the society's moral code. The twelve men in the jury-box have the last word, or almost the last word, as to whether a man goes to prison or to the gallows. But they are exposed in advance to many conditioning voices, some of decisive influence.

Confronting his second interrogatory, Sir Patrick concludes that the state has the right to punish violations of the code of public morality through the criminal law for reasons which are implicit in the definition itself: if, as he says, "a recognised morality is as necessary to society as, say, a recognised government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence." [11]

[9] *Essays in Jurisprudence and Ethics* (1882), Macmillan, pp. 278 and 353 (judge's note).
[10] Devlin, p. 16.
[11] *Ibid.*, p. 13.

But this general proposition, as Sir Patrick is the first to assert, does not in itself settle particular cases. All crime may be sin, in the Justice's analysis, but he does not believe that all sin should be made criminal. The two spheres are indissolubly linked, but they are not and should not be co-extensive.

In deciding how far the law should go in enforcing the common morality, Sir Patrick says, law-makers must strike a balance, as they must in every other aspect of the conflict between liberty and order. The state cannot be completely shut out on questions of morality. But the individual can hardly "be expected to surrender to the judgment of society the whole conduct of his life."[12] The state's interest in enforcing a given rule of behaviour accepted by the community as right must be weighed by the law-makers against a series of principles, which I should say are as much a part of the society's "common morality," in Sir Patrick's definition of the phrase, as its views about marriage, sexual behaviour or violence. As Sir Patrick states them, the principles which ought to guide the modern British (or American) law-maker in determining the limits of the law in this sphere are rules of experience and propriety in the use of social force—principles of peculiar centrality for a society which aspires to freedom. If the outcome of such a balancing cannot result in exact definitions, it hardly follows that it can yield no definitions at all.

Lord Justice Devlin suggests that these rules govern modern democratic law-makers, as principles upon which "most people would agree."[13] They have the same status and force in law-making, he suggests, as do the principles of judicial precedents in the common law process of deciding cases in court.[14] Put in an order somewhat different from Sir Patrick's, his restatement of the prevailing law in this regard is as follows: The state should preserve and protect as large an area of privacy and of freedom for the individual as possible, especially in matters of morals and of conscience. This rule is not and should not be confined only to thought and speech; it extends to action also, as in the case of conscientious objection to military service, and the disapproval of wire-tapping both in detection and in the formation of law. The law is and should be concerned with the minimum and not the maximum. The penalties of the law can be enforced, but the law cannot compel a man to be or to become upright. Its machinery is

[12] *Ibid.*, p. 16.
[13] *Ibid.*, p. 17. Sir Patrick's exposition of the principles controlling the law-making process in this area appear at pp. 17–23.
[14] *Ibid.*, p. 17.

not very efficient. The law should not be burdened with tasks it cannot perform, or cannot perform without becoming a Leviathan.

These considerations lead to several related principles of considerable moment in his argument. "Nothing should be punished by the law that does not lie beyond the limits of tolerance. It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation," indeed of "disgust," "deeply felt and not manufactured,"[15] "honest and dispassionate."[16] The presence of such intense feelings, believed by "the reasonable man" to be shared by all "right-thinking" men, is a necessary but not a sufficient condition for legal action in the sphere of morals. Legal intervention is not justified only because there is a strong and pervasive feeling that the conduct in question is extremely threatening and extremely reprehensible to basic rules of community life. If the law should rest simply on "disgust," Sir Patrick says, "it would be wrong."[17] The fact that there is so much immorality which has never been brought within the law shows that the toleration of a good deal of immorality does not necessarily unravel the fabric of society.

> "[B]efore a society can put a practice beyond the limits of tolerance there must be a deliberate judgment that the practice is injurious to society. There is, for example, a general abhorrence of homosexuality. We should ask ourselves in the first instance whether looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it. Our feeling may not be so intense as that. We may feel about it that, if confined, it is tolerable, but that if it spread it might be gravely injurious; it is in this way that most societies look upon fornication, seeing it as a natural weakness which must be kept within bounds, but which cannot be rooted out. It becomes then a question of balance, the danger to society in one scale and the extent of the restriction in the other. On this sort of point the value of an investigation by such a body as the Wolfenden Committee and of its conclusions is manifest."[18]

There is a further principle to be given great weight in decisions on such questions. The law-maker should be acutely aware that

[15] *Ibid.*
[16] *Ibid.*, p. 23.
[17] *Ibid.*, at p. 17.
[18] *Ibid.*, at p. 18.

limits of tolerance shift, and that even intense public feelings change. Yet the law itself is often difficult to amend, especially where reform may seem to imply the law-makers' approval of conduct regarded by the public as immoral. The law should therefore be slow to act.

> "By the next generation the swell of indignation may have abated and the law be left without the strong backing which it needs. But it is then difficult to alter the law without giving the impression that moral judgment is being weakened. This is now one of the factors that is strongly militating against any alteration to the law on homosexuality." [19]

Where the law-makers are satisfied that the preceding conditions have been met, they should consider an additional question before determining to make breaches of the moral law criminal: do the instruments of the criminal law offer appropriate ways for dealing with particular deviations from the code of morality? The tools of the law are "fines, imprisonment, or lesser forms of supervision (such as Borstal and probation) and—not to be ignored—the degradation that often follows upon the publication of the crime. Are any of these suited to the job of dealing with sexual immorality? The fact that there is so much immorality which has never been brought within the law shows that there can be no general rule. It is a matter for decision in each case; but in the case of homosexuality the Wolfenden Report rightly has regard to the views of those who are experienced in dealing with this sort of crime and to those of the clergy who are the natural guardians of public morals." [20]

For these reasons, then, in Sir Patrick's exposition, the course of wisdom in law-making should be to place as few moral prohibitions as possible within the criminal law. The enforcement of the criminal law plays a part in the development of the common morality, but other forces are of equal or of greater importance; the influence of thought and religion, and of careful studies; and that of social experience with the tides of feeling, and the limited reach of law.

Thus Sir Patrick's answer to his third question would establish severe limits on the ways in which society should exercise the inherent powers he says it possesses, in accordance with the answers he offers to his first two questions. He concludes that the extent to which the state should undertake to act against sin is, in his vocabulary, essentially a practical question, not to be settled by

[19] *Ibid.*, at p. 19.
[20] *Ibid.*, at p. 21.

clear and simple lines of logic. I should prefer to phrase the matter differently. The law-makers' conclusion in each instance, I should say, is a logical one, but it is the logical function of several variables, not of one. The boundary line, therefore, is fixed by judgments as to the relative strength of the several variables at different times, and under different circumstances.

As I read "The Enforcement of Morals," these are the main points of the author's argument. I have put to one side three themes, not crucial to his position, which have, I think, coloured the reception of his lecture.

The first is a forthright and affirmative view of the primary place of the Christian religion in the inner life of both the moral and the positive law of England.[21] That Christian morals are the basis of the criminal law, the Lord Justice says, is an historical fact which both free-thinker and non-Christian can accept, without offence to his convictions. In this secular age, most of the literature of legal philosophy ignores the problem which Sir Patrick puts with such eloquence and insight. The reasoning of his lecture stands without benefit of this passage, as an exercise in sociological jurisprudence. While his assertion frames a question to be considered with the utmost seriousness by historians of law, and by students of legal philosophy, it raises issues of difficulty, reaching far beyond the scope of his paper.

The second element in Sir Patrick's lecture which I regard as extrinsic to its essential logic is of another order. At several points, he seems to say rather gloomily, a relaxation of moral standards is the primrose path to social decay. "It may be that history is a tale of contraction and expansion and that all developed societies are on their way to dissolution. I must not speak of things I do not know; and anyway as a practical matter no society is willing to make provision for its own decay."[22] The trouble with this cry, the perennial reproach of the older to the younger generation, is that it is as impossible to document today as it was in the time of Isaiah or Oswald Spengler. It is hard to conclude, reading Fielding and Smollett, or the life of Melbourne, or the diaries of Boswell, or looking at the pictures of Hogarth, that we really are worse behaved than our ancestors. I rather doubt it, and in any event Sir Patrick Devlin is very young to accept such views. Perhaps they reflect the impact on a sensitive man of years at the assizes. If that is the case, his recent promotion to the less sordid docket of the Court of Appeal should work a cure.

[21] *Ibid.*, at pp. 23–25.
[22] *Ibid.*, at p. 19. See also pp. 11–12, 14–15, 22.

The third embellishment to the logical sequence of Sir Patrick's lecture is his use of the analogy of treason. If, he says, an accepted code of morals is as essential to the life of a community as its political ideas and its political system, enforcement of the public morality is as proper as the legal prohibitions against treason, sedition and disloyalty. "Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both, and without either it dies."[23] The inherent right of a state to defend itself against destruction is unchallengeable. Certainly no American, descended both from Jefferson and from Lincoln, can deny either the privilege of revolution or the duty of the state to resist it. The problem of preserving the common morality of a society is generically related to that of protecting the state and society against forcible overthrow, but in many ways it is different.[23a] While Sir Patrick's analogy is pertinent, his treatment of it, within the limits of a lecture on another topic, is necessarily incomplete. At what point do ideas and political acts, otherwise normal and innocent, become crimes against the safety of the state? What criteria can Millian societies use with propriety to fix the frontiers between protected intellectual and political freedom and prohibited sedition? Are such criteria, and the processes of applying them, comparable to those which Sir Patrick develops for determining when immoral behaviour should be made criminal? The appropriate limits of legal action against "disloyalty" and "sedition," under circumstances presenting varying degrees of external danger, are matters which American law has had to face in considerable detail since 1917. The problem is one of great delicacy and difficulty, and the solutions we have reached, while far from final, are often disturbing, and sometimes wrong.[24] On the whole, Sir Patrick's case would be clearer if his analogy to treason were put aside, or developed in greater detail. The two problems are akin, but by no means commensurate, since they involve the application of similar rules to quite different areas of social experience. There is, for example, no general sense of public outrage at the thought of Karl Marx sitting quietly in the Reading Room of the British Museum and writing a book which helped to detonate the universe. On the

[23] *Ibid.*, at p. 23. See also pp. 11, 14–15. I have discussed the legal problems raised by laws regarding loyalty in "Needed: a Rational Security Program," *Harper's Magazine*, July 1957, pp. 33–40.

[23a] I am indebted to Professor Helen Silving for the observation that in psychoanalytic terms sex crime and treason are related.

[24] My views on several aspects of these problems are developed in "The Japanese-American cases—A Disaster," 54 Yale L.J. 489 (1945), "The Democratic Character of Judicial Review," 66 Harv.L.R. 193 (1952), "Needed: A Rational Security Program." *Harper's Magazine*, July 1957, p. 33, "The Supreme Court and the People's Will," 33 *Notre Dame Lawyer* 573 (1958), "The Court and its Critics," *South Texas Law Journal*, Spring 1959, p. 160.

contrary, the code of public morality would regard his conduct, whatever its ultimate consequences, as highly respectable, and worthy of protection on deeply cherished principles of personal freedom.

By way of shorthand comment, one can say little beyond the commonplace, that in both areas, the wise rule is for the law to do as little as possible. Extensive legal action, either in the political sphere or in that of morals, has in the past usually led to abuses which threatened one of the great ends of any legal system, what Montesquieu called the "tranquillity of mind" of the individual, drawn from a legal order so constituted that no man need be afraid of another. Even when qualified by Sir Patrick's latitudinarian principles—privacy, tolerance, rationality in law-making, a strong sense of the minimalist character and limits of the law, etc.—his analogy grates in the ears. It brings bleak echoes to the mind of any student of British and American legal history, the memory of battles which did much to shape our modern Constitutions. Adjusting the criminal law to the shifting boundaries of privacy is hard enough, without invoking the shades of Wilkes and Junius, Erskine and Tom Paine.

II

Professor Hart's critique of "The Enforcement of Morals" starts with the claim that Sir Patrick's argument repudiates the liberal position, stated in the Wolfenden Report, and classically put by Mill: "The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others."[25] On the next page, however, Professor Hart concedes that Mill's thesis may well be too simple. "There are multiple criteria," he writes, "not a single criterion, determining when human liberty may be restricted. Perhaps this is what Sir Patrick means by a curious distinction which he often stresses between theoretical and practical limits. But with all its simplicities the liberal point of view is a better guide than Sir Patrick to clear thought on the proper relation of morality to the criminal law; for it stresses what he obscures—namely, the points at which thought is needed before we turn popular morality into criminal law."[26] He then continues with a paragraph which I read as a volte-face, amending Mill's approach beyond recognition, and accepting the major premises of Sir Patrick's argument, and the whole of its substance, as I have summarised it here, save for minor nuances of style, taste and emphasis.

[25] Hart, at p. 162.
[26] *Ibid.*, at p. 163.

> "No doubt we would all agree that a consensus of moral opinion on certain matters is essential if society is to be worth living in. Laws against murder, theft and much else would be of little use if they were not supported by a widely diffused conviction that what these laws forbid is also immoral. So much is obvious. But it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society; nor is there the slightest reason for thinking of morality as a seamless web: one which will fall to pieces carrying society with it, unless all its emphatic vetoes are enforced by law." [27]

The burden of this aspect of Professor Hart's criticism of Sir Patrick Devlin seems to be that the Judge fails sufficiently to stress the importance of thought, reason and study, as compared with strong popular feeling, among the forces which should guide law-making. On reviewing Sir Patrick's treatment of the principles which, in his striking metaphor, govern the making of British legislation in the same way that the principles of past decisions influence the judicial process, I do not find this a fair criticism.[28] But even in Professor Hart's terms, I find his strictures unacceptable. I conclude that they fall into a trap against which he has often and cogently warned others: of failing to distinguish the "law that is" from the "law that ought to be."

Some years ago, Professor Hart gave a Holmes Lecture at the Harvard Law School, defending the early "positivists" and their separation of law and morals.[29] Bentham and Austin, he pointed out, were trying to free men's minds of the incubus of Blackstone in defining law, and in thinking about it. They were fighting the last stages of the battle to secularise the state—to liberate legal thought from the view that positive law was not really law if it was contrary to natural law, in some sense of that elusive term; and that because a rule was morally right it was by that token a legal rule. Hence they stressed the distinction between the law that is—the actual pattern of prevailing decision—and the law that ought to be, according to criteria of natural law, or standards of justice which individuals or groups sought to persuade society and its law-makers to accept. My approach to Professor Hart's Holmes Lecture is somewhat different from Professor Fuller's. I have no difficulty with the distinction between the "law that is" and the "law that

[27] *Ibid.*

[28] See pp. 179-182, *supra.*

[29] "Positivism and the Separation of Law and Morals," 71 Harv.L.R. 593 (1958), answered by Professor Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," 71 Harv.L.R. 630 (1958).

ought to be." It seems to me useful and helpful in ordering thought about law. But throughout his Holmes Lecture, Professor Hart equates this pair of phrases with another which he seems to regard as synonymous—the separation of law and morals.[30] I cannot understand why Professor Hart treats these two dichotomies as identical and interchangeable, nor, in so far as I can follow him, do I understand why he considers it important to do so.

In Professor Hart's view, every legal system which has merited the citizen's moral obligation of obedience has met certain minimal "moral standards," and contained certain fundamental elements derived from and related to the assumption that it aims at the goal of justice.[31] Indeed, Professor Hart is willing to claim that such fundamental rules of a moral character are a "natural" necessity in law, at least in any legal order we have hitherto known, or can now imagine. Secondly, in addition to this minimal but indispensable moral element in law and its administration, there is another link between law and morality, even in the perspective of Professor Hart's strict "separation" of law and morals: at many points positive rules of law contain or mirror moral principles. Historically the law has been influenced by moral opinion, which it has in turn helped to shape.[32] Beyond these two aspects of the relationship of law and morals, there is a more basic issue. Every rule of "the law that is" at any time contains a moral core, a core of "purpose," related to its core of denotation. It is animated by a

[30] Throughout his lecture paragraphs start with the "is-ought" distinction and then the language shifts, referring to the subject-matter of the paragraph as the distinction between law and morals. See Hart, *op. cit.*, *supra*, note 29, at pp. 597 (second full paragraph); 600–601 (first three paragraphs of Section II); p. 615 ("The third criticism of the separation of law and morals," which starts Part IV, is to be compared with "I now turn to a distinctively American criticism of the separation of the law that is from the law that ought to be," the opening words of Part III, on p. 606); p. 624 ("the Utilitarian or 'positivist' insistence that law and morality are distinct," referring to the theme of Part V, dealing with "the confusion of what is and what ought to be law," p. 621). Professor Hart has told me that he did not intend to treat these distinctions, "is-ought" and "law-morals," as exact synonyms or equivalents, and perhaps the root of my misinterpretation of his text lies in the possibility that he would offer a more limited definition than I should of the moral element in law. See pp. 612–613, where he warns of the danger of "thinking in a too simple-minded fashion about the word 'ought.' This is not because there is no distinction to be made between law as it is and ought to be. Far from it. It is because the distinction should be between what is and what from many different points of view ought to be. The word 'ought' merely reflects the presence of some standard of criticism: one of these standards is a moral standard but not all standards are moral." This comment, however, would not justify his usage of these two sets of words, even when fully developed. It would identify morals as one of the possible components of the legal "ought," along with prudence, safety, habit, etc. But it would continue to exclude morals from the law that is. If I have misread Professor Hart's purpose, I regret it. My only defence is that at least for one reader his text is ambiguous.

[31] *Ibid.*, at pp. 621–624.

[32] *Ibid.*, at pp. 598–599.

conception of policy, a decision made at some point in time that the rule in question represents a just way to approach a given problem. The effective purpose of the rule may be that of the original legislators or judges who formulated it, or that of the later parliaments and judges who successively applied it, interpreted it, and gave it coherence, direction and momentum. Looking at the statute involved as a whole, or at the whole body of judicial precedents we may be considering, in the full setting of their history, enforcement and effect, we can see a line of policy, an articulation of the social ends the rule is supposed to serve. As the rule or practice develops through time, we may sometimes say that the process of its growth is simply an elaboration of ideas and purposes which were there all the time, hidden seeds of later flowers; at others, we may regard the change in the character, scope and impact of the rule as too great to permit so comforting a bow to precedent. In the latter case, we habitually say, the law has changed in a more fundamental sense: the older "ought" has become the new "is." The moral ideas—by which I mean the totality of the law's ideas as to just public policy—of the more remote and the more recent past have come together with those of the present, through the chemistry of our law-making procedures, and have evolved a new rule. In this way, in Holmes' phrase, the law becomes the "witness and external deposit of our moral life," its history "the history of the moral development of the race." [33]

One can use different forms of language to describe this process. On the whole, I should prefer, with Professor Hart, to say that each stage of the way involves law-making, though not arbitrary or discontinuous law-making, but law-making nonetheless, according to the prevailing rules of judicial and legislative practice. Whether we employ one formula or another to identify the path of legal change, most English and American lawyers, I suspect, would now agree, as pupils of Austin, Holmes and Maitland, on the essential nature of what happens.

Against this background, what is Professor Hart's charge against Sir Patrick Devlin?

Sir Patrick posed a question about the law that is in relation to the existing code of public morality—that is, to state what is involved in asking whether the existing positive law appropriately corresponds to the existing state of public morals. Professor Hart reproaches him for not sufficiently emphasising that the given state

[33] I believe and hope that the preceding paragraph corresponds to Professor Hart's analysis, especially at pp. 627–629 of his Holmes Lecture, although it does not use the terminology he would prefer. Holmes' remark appears in "The Path of the Law" (1897) 10 Harv.L.R. 457, 459.

of public morality may represent irrational and unjustified prejudices, embalmed in the customs and outlook of the people. The law that is at any time, Sir Patrick says, has a moral base. The law may be good or bad law, according to moral criteria other than those of the common morality embodied in it. Or it may have become bad law in another sense, by failing to keep up with changes in the common morality itself—changes in the view society now takes of privacy, the permissible limits of freedom, the consequences of enforcement as compared with those of non-enforcement, etc. The essence of his position in this connection, I think, is that the criminal law should express, and must express, some of the strong positions of a society's common public morality. It can appropriately change only when the community's law-makers are persuaded that the common morality has changed—that the practice being condemned, like witchcraft, does not exist, or, like heresy, should be taken from the sphere of public morals and transferred to that of private affairs.

While I take it that Professor Hart accepts Sir Patrick's thesis, in this limited sense, he addresses to it an objection which he considers basic:

> " We are not, I suppose, likely, in England, to take again to the burning of old women for witchcraft or to punishing people for associating with those of a different race or colour, or to punishing people again for adultery. Yet if these things were viewed with intolerance, indignation, and disgust, as the second of them still is in some countries, it seems that on Sir Patrick's principles no rational criticism could be opposed to the claim that they should be punished by law. We could only pray, in his words, that the limits of tolerance might shift.
>
> " It is impossible to see what curious logic has led Sir Patrick to this result. For him a practice is immoral if the thought of it makes the man on the Clapham omnibus sick. So be it. Still, why should we not summon all the resources of our reason, sympathetic understanding, as well as critical intelligence, and insist that before general feeling is turned into criminal law it is submitted to scrutiny of a different kind from Sir Patrick's? Surely, the legislator should ask whether the general morality is based on ignorance, superstition, or misunderstanding; whether there is a false conception that those who practise what it condemns are in other ways dangerous or hostile to society; and whether the misery to many parties, the blackmail and the other evil consequences of criminal punishment, especially for sexual offences, are well understood. It is surely extraordinary that

among the things which Sir Patrick says are to be considered before we legislate against immorality these appear nowhere; not even as 'practical considerations,' let alone 'theoretical limits.' To any theory which, like this one, asserts that the criminal law may be used on the vague ground that the preservation of morality is essential to society and yet omits to stress the need for critical scrutiny, our reply should be: 'Morality, what crimes may be committed in thy name!'" [34]

But Sir Patrick did not fail to urge the necessity for independent, dispassionate and far-ranging study and judgment by law-makers as one of the binding rules of British law-making, even when the law-makers confront popular feelings worked up to "a concert pitch" of moral indignation.[35]

Professor Hart, however, reads the Judge's text as repudiating what he calls a "rationalist morality"—to me a most puzzling and obscure phrase, in this context. Does it imply that our law-making is or should be controlled by independent and autonomous Gods of Pure Reason, installed somewhere in our political systems, and endowed with the power to determine such questions for society, free of the prejudices to which lesser men are subject? This is hardly a plausible reading of Professor Hart's text, nor a likely position for a liberal democrat to take. If, however, Professor Hart means that it "would be wrong" for law-makers to act on the basis of disgust alone [36]; that they should make a separate and independent judgment that a practice is injurious to society as well as odious [37]; that they should consider the implications of the half-dozen qualifying principles whose exposition requires almost one-third of Sir Patrick's lecture, then I fail to understand how his position differs from that of the Justice.

In this connection, Professor Hart criticises Sir Patrick Devlin for failing explicitly to include among his accepted rules of law-making a requirement that the law-makers weigh up and compare the human misery caused by the immoral behaviour and that incident to its punishment. Sir Patrick does enjoin law-makers to consider whether the tools of law, including the degradation of publicity, are in fact suitable means for dealing with a particular moral breach, and, with reference to homosexuality, he commends the Wolfenden Report for regarding seriously the views of experienced persons on this point. If Professor Hart means only that the punishment should fit the crime and the criminal, and that

[34] Hart, p. 163.
[35] See pp. 179–182.
[36] Devlin, at p. 17.
[37] *Ibid.*, at p. 18.

the law should avoid excessive or vindictive punishments, I should suppose that the thought could fairly be read into Sir Patrick's general views on criminal law, as expressed in his lecture. If Professor Hart means more than that—if, that is, the misery of punishment (and the risks of blackmail) constitute a special factor to be taken into account more for one class of offenders than another—then I fail to follow his reasoning.

Yet, in the passage quoted on p. 188, Professor Hart concludes that Sir Patrick Devlin's theory would give inadequate scope to "reason" in resisting the demand of aroused prejudice for a legal condemnation of what the community regards as sin. Under Sir Patrick's view, Professor Hart says, we could only pray that the limits of tolerance might shift.

From Professor Hart, this is a most unexpected point. For Professor Hart has urged elsewhere that even Nazi law was law, to be treated as such until it was changed,[38] and he has been a vigorous leader in teaching lawyers that man can do much more than pray when he is confronted by bad law. What man should not do, however, in Professor Hart's view, which I fully share, is to fall back on Blackstone, and pretend that the bad law is not there, or is not law.

Perhaps one may test Professor Hart's thesis in another and less explosive context than the law of the Wolfenden Report: that of polygamy. In some of the Mormon areas of the United States, polygamy has been, and still is, a practical problem for the law. There have been occasional prosecutions, and convictions, even in recent years. Should we ask whether the preference of the common morality in the United States for monogamy, enforced by the criminal law, is based on "ignorance, superstition or misunderstanding"? Does it derive from "a false conception" that those who practise polygamy "are in other ways dangerous or hostile to society"?[39] Should we inquire whether polygamy is tolerable if confined, but "gravely injurious" if allowed to spread?[40] Should we condemn ordinary bigamy, contracted for pleasure, but except polygamy based on sincere religious belief? Suppose we engage in all these acts of critical scrutiny and rational investigation which to my mind both the Professor and the Judge enjoin. Should we not then conclude that monogamy is so fundamental a theme in the existing common morality of the United States that the condemnation of polygamy as a crime is justified, even though in the end the repugnance to it rests on "feeling" and not on "reason"?

[38] Hart, *op. cit.*, *supra*, note 29, at pp. 615-621.
[39] Hart, p. 163.
[40] Devlin, p. 18.

The Supreme Court of the United States has upheld such laws, in the teeth of the Constitutional provision that " Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." And the federal law is still enforced, although the old territories of Utah and Arizona have long since become states, and the normal jurisdiction over crime and marriage has passed from Congress to the state governments.[41]

I cannot conclude that Professor Hart's analysis of this problem would differ from that of Sir Patrick Devlin, even in form.

Professor Hart's paper also criticises Sir Patrick's comparison of laws protecting the common morality and those protecting the state against treason, sedition and disloyalty. His criticism is placed on grounds quite different from those suggested earlier.[42] Professor Hart seems to urge that the inherent governmental power of self-defence is greater than its power in the realm of morals. I should not go so far. Linking the two problems, Professor Hart urges, is " grotesque " and " absurd " unless it can be clearly shown that offending against a given item in the code of common morality is likely to jeopardise the whole structure. " Private subversive activity is, of course, a contradiction in terms because ' subversion ' means overthrowing government, which is a public thing . . . [we may] say that though there could not logically be a sphere of private treason there is a sphere of private morality and immorality," [43] or, to use Sir Patrick's terminology, a sphere of " private behaviour in matters of morals." [44] The issue is not to be disposed of so simply. The racial theories of Houston Chamberlain, the constitutional theories of John C. Calhoun, the social theories of Karl Marx, the theology of Martin Luther, to cite a few random instances, were all used as tools of revolutionary action; yet all were produced, published and initially discussed under circumstances which we should today regard as those of protected private (and public) behaviour in matters of thought, speech, politics. So, too, the intellectual and political movement of modern socialism in Western countries, though it often professed to use revolutionary terms, and even to advocate revolutionary means, in fact helped, with other forces, to produce through peaceful procedures of persuasion and democratic action not the overthrow of ordered government but a long series of changes both in the forms of government and in the content of prevailing ideas of social justice. When words, books,

[41] *Reynolds* v. *United States*, 98 U.S. 145 (1878). See also *Musser* v. *Utah*, 333 U.S. 95 (1948) (state prosecution for advocacy of polygamy as a conspiracy to commit acts injurious to public morals).
[42] See pp. 183–184, *supra*.
[43] Hart, p. 163.
[44] Devlin, p. 10.

meetings, speeches, marches, petitions and political acts become a threat to the existence of the state is a question of fact. When the law should interfere depends upon an appraisal of the danger to government in relation to other values which our culture also prizes. Laws against disciplined Fascist or Communist groups, for example, or even those against the advocacy of Fascist or Communist programmes, raise one set of issues in times of relative peace and stability, quite another in times of war or civil disturbance. Despite the inevitable brevity of his treatment, Sir Patrick's statement that it is impossible to set "rigid bounds to the part which the law may play"[45] in the suppression either of vice or of treason is closer to the reality of the problem than Professor Hart's "logical" distinction between the privacy of morality and the public character of all subversion.

III

Mr. Wollheim's critique of Sir Patrick Devlin's lecture is paradoxical and inconsistent. Sir Patrick's essay contains "little reasoning," Mr. Wollheim says, "that is at once valid and acceptable."[46] Its conception of society as a community of ideas, which I should have thought was a commonplace of sociology and anthropology, is an old notion, he claims, whose modern forms are Communism and Catholicism; and it has been the pride of the civilised parts of Europe to oppose to it the liberal theory of politics, which declares that the identity and the continuity of a society resides not in the common possession of a single morality, but in the mutual toleration of different moralities.[47] At one point we are told that Sir Patrick views toleration, and his other principles of law-making, as part of the common morality, drawn from the same sources as the community's opinions on matters of sexual behaviour and violence.[48] At another Mr. Wollheim says that this reconciliation of Devlinism and what he calls Liberalism will not work, because "toleration cannot be seen as a morality conformity to which issues in uniform behaviour."[49] But to Mr. Wollheim the problem of Sir Patrick's lecture does not exist unless there is "behaviour of a uniform kind over a fairly large area of human activity."[50] A society can be marked by universal toleration, Mr. Wollheim says, and yet display no common pattern of

[45] Devlin, p. 15.
[46] Wollheim, p. 40.
[47] *Ibid.*, p. 38.
[48] *Ibid.*, p. 36.
[49] *Ibid.*, p. 39.
[50] *Ibid.*, p. 38. Surely this point, if I understand it, is illusory verbal play. The most liberal of Liberal societies betrays some uniformities of behaviour it regards as right: *i.e.*, to abstain from murder or polygamy. The question is, how much uniformity exists. And how much should be enforced by law? Does Mr. Wollheim mean that a monogamous society must allow Mormons or

behaviour: for what is tolerated may in each case be different. Devlin's insistence that it is in the nature of a society to possess a community of moral ideas is therefore imcompatible with Liberalism; and those who find Liberalism acceptable must reject the concept of society on which the whole of Devlin's argument rests. This extraordinary sequence can be derived from Mr. Wollheim's definition of Liberalism, quoted above. For him, the question of uniformity of behaviour is not evidently of importance, although he discusses it at length. The point of his argument, it would seem, is that in the perspective of Liberal political theory the moral code must be permissive, and not enforced. A liberal society, in his sense of the term, could be entirely conformist, so long as its patterns of behaviour derived from free choice, and not the coercion of a community insisting on deference to its shared fundamental ideas about the organisation and conduct of society.

It is apparent that Mr. Wollheim uses the word Liberalism in a most private sense, although he identifies his argument with the feelings and loyalties normally clustering around liberalism as a movement in modern thought. His definition would equate "Liberalism" with anarchy, and deny all known societies the title of "Liberal," for even those commonly regarded as most liberal have betrayed *some* departures from the rule of moral permissiveness, in regard to their toleration of unpunished violence, their rules of family structure, their acquiescence in private or public property, etc.

But even if one were to accept Sir Patrick's idea of society as a "moral entity," Mr. Wollheim continues, his conception of the moral base of society is "totally irrationalist," and excludes "what it has been the triumph of civilisation to establish: the taming of the conscience by reason." [51]

Mr. Wollheim concludes his article with a paragraph I find ambiguous.

> ". . . Of course the ultimate position may be correct: in the history of ideas as many bad arguments have been produced for true conclusions as for false ones.
>
> "But there may well be those who, reading *The Enforcement of Morals*, are led not merely to reject it but to reject in advance any argument of a similar kind. They may feel that any attempt to draw a line between sin and crime that makes reference to notions like the moral community or society's

Mohammedans to practise polygamy, in the name of mutual toleration of different moralities, or lose its title to Liberalism?

[51] *Ibid.*, p. 39.

> unqualified right to self-preservation is doomed to be unacceptable, and equally that any discussion of the subject that fails to mention human fallibility and the self-development of the individual and his faculties must be miserably incomplete. To those who feel like this I would lend a sympathetic ear. But I must, regretfully, point out that nothing I have set down here, none of the limited and local argument I have used against Devlin, can increase, to any measurable degree, the authority of what they say." [52]

Read in one perspective, Mr. Wollheim's conclusion may be no more than a warning that what he regards as Devlin's failure to define the relation between crime and morals in terms of notions like the moral community and society's right to self-preservation is hardly proof that others may not in the end succeed. Read in the context of his article, however, with its various concessions and admissions, and its apparent reliance on a narrow definition of Liberalism, his final sentences come close to abandoning all that has come before, including the version of Liberalism he has espoused; for he approaches the view that an entirely permissive morality is untenable, and that the relation of crime and morals must in the end be described and defined in terms of notions like the moral community and society's right to self-preservation, that is, in terms of the notions with which Sir Patrick has built his argument. Only an anarchist, Mr. Wollheim says, could deny the inherent right of society to protect itself against destruction, but that right is "acceptable only when 'self-preservation' is understood in a far narrower sense than that in which it figures in Devlin's argument." [53]

In part, Mr. Wollheim's argument rests on a rather careless and airy reading of Sir Patrick's text.[54] For the rest, what he seems to be expressing is the fear that Sir Patrick would weigh the elements of judgment differently from the way in which he would do so, in deciding when legal intervention to enforce morals is permissible. Since Sir Patrick is painfully the judge in refusing to indicate how the interplay of principle should be determined in a given situation by the law-makers, I can see no justification for Mr. Wollheim's alarm, as a matter of reasoning from Sir Patrick's text. The alarm seems rather to proceed from an emotional reaction to some of the language Sir Patrick uses, and to the embellishments mentioned on pp. 182–184, as extrinsic to his theme.

[52] *Ibid.*, p. 40.

[53] *Ibid.*

[54] The principles of law-making, discussed at pp. 179–182 above, for example, are barely mentioned in Mr. Wollheim's article, save as "vague and imprecise" ideas. Nor can I see any justification, in the light of those principles, for arguing that Sir Patrick's concept of society's right of self-preservation would apply as rigorously to amelioration as to corruption, and should thus be invoked against all change. See Wollheim, p. 40.

Mr. Wollheim makes another point, charging Sir Patrick with inconsistency.

> "For we are told at one point (in answer to the second question) that society has an unlimited right to enforce morality and then we are told later on (in answer to the third question) that there are certain conditions—conditions, it is true, capable only of very vague formulation—under which society ought not to enforce morality. But if 'right' here is used to mean 'right,' and 'ought' here is used to mean 'ought,' how can the argument taken as a whole avoid the charge of self-contradiction?" [55]

Part of Mr. Wollheim's difficulty here is that both he and Sir Patrick sin against the pure canon of Hohfeldian terminology. But very few theorists of law, and even fewer judges, customarily use Hohfeld's analysis of the familiar legal terms right, duty, privilege, power, and their correlatives and opposites. The sin is so common, save among the faithful at Yale, that we had better ignore it as charitably as possible. The correct Hohfeldian way of putting Sir Patrick's thesis, I should think, would be to say that the state has the "power" to protect its public morality through the law; that the citizen has no "immunity" against such action; that the state, however, is under the "duty" in exercising its "power" to enforce and respect certain equally real "rights" and "privileges" of its citizens, in accordance with the principles governing British law-making to which he addressed so considerable a part of his lecture; and that in some instances the state may have a "disability," or perhaps may not have the "privilege" to qualify these rights and privileges of the citizen even in the name of self-defence.[56]

The point of verbal usage aside, however, I find that Mr. Wollheim's attack fails, in the terms in which he puts it. I cannot read Sir Patrick's lecture, as Mr. Wollheim apparently does, to assert that society's "right," or as I should prefer, its "power" to enforce morality, is "unlimited," or that Sir Patrick adheres to a theory of distinctions which prefers one criterion of distinction to many. Sir Patrick does say that society's "right" to defend itself is "theoretically" unlimited save by the application in various circumstances of "elastic" and "practical" principles of personal freedom, toleration, privacy, awareness of the limitations and

[55] Wollheim, pp. 36–37.

[56] Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as applied in Judicial Reasoning," 23 Yale L.J. 16 (1913), reprinted in W. W. Cook, ed., *Fundamental Legal Conceptions and other Essays by Wesley Newcomb Hohfeld* (Yale University Press, 1923). Professor Hart is of course an enthusiastic contemporary Hohfeldian.

dangers of law enforcement, a strict rule that the law ought to interfere with the individual's moral freedom only in extreme cases, etc. Taking Sir Patrick's vocabulary in its setting, and reading his lecture as a whole, it seems quite unjustified to stress his distinction between "theoretical" and "practical" limits as proof that he regards his principles governing law-makers as weak, insignificant and subordinate factors in the legal process. At intervals in his article, indeed, Mr. Wollheim concedes as much. For at times he concludes, as I do, that in Sir Patrick's analysis the principles which control the enforcement of morals by law are also part of the common morality, derived from aspects of experience and aspiration as profound as those which determine a society's attitude towards property, sex, and violence.

IV

I should conclude, therefore, that both Professor Hart and Mr. Wollheim wind up in the grip of Sir Patrick's essential argument: that any society possesses a common morality, which it is empowered to enforce according to the modalities of its own legal system. Both the Judge's critics seem to fear that his views would justify democratic authoritarianism, encouraging the majority to enlarge the area of public morality, and to narrow the area of private affairs. I can find nothing in Sir Patrick's argument to support this threat. The balance between order and freedom, as he presents it, is still a balance, depending upon the weight given by detached and "reasonable" law-makers to a series of principles of equal dignity. Because Sir Patrick puts Point Three of his argument third is hardly a reason for inferring that he regards it as less important than Points One and Two.

In perspective, Sir Patrick is far from a Hobbesian. His stress on the principles which limit the power of the state to act in the enforcement of morals puts him rather in the main line of English liberal political theory, which extends from Hooker and Locke to Mill and beyond, a tradition which regards the utmost possible liberty for the individual as the first goal of political action, without denying the existence of the state, or its right to exist.

I have deferred to the conclusion a theme which runs through both these critiques of Sir Patrick Devlin's lecture: that he bows to an irrational or subjective view of the common morality, and does not insist that "reason" should triumph at all costs over the emotional feelings of man. It is a strange criticism to hear made in this post-Freudian age, which has been forced, as man has rarely been required to do before in his history, to acknowledge the power

of the irrational in human affairs. It is a strange criticism to meet in an intellectual universe which has long had the advantage of a literature which includes Montesquieu and Sir Henry Maine, Max Weber, Durkheim, Ehrlich, Spencer and Buckle. And it is a strange criticism to confront in England, where the risk of majoritarian tyranny is minimised by custom and the temper of the people, not by a written Constitution and a Supreme Court. Sir Patrick does not yield to his critics in his stress on the need for calm and dispassionate deliberation as a binding rule which law-makers are obliged to respect, nor does he ignore the ways in which popular prejudices, and popular views of moral problems, change with time. To me, he seems clearly right in stating as a fact that the common morality of a society at any time is a blend of custom and conviction, of reason and feeling, of experience and prejudice. A page of history, to recall Holmes' famous quip, may not be worth a volume of logic; but in the life of the law, especially in a common law country, the customs, the common views, and the habitual patterns of the people's behaviour properly count for much.

The stress on custom as a source of law, so characteristic of our legal order, hardly implies that reason has no place in law, or that law is no more than a passive register of social history. The law changes, as the society changes its notions of what it wants to achieve through law; and in that process it has been the pride of law to lead as often as it has followed. The distinction between the "rational" and the "irrational" in the process of forming moral opinion—and indeed, in reaching other conclusions as well—is probably impossible to establish with any rigour. But nothing in Sir Patrick's lecture would weaken the primary importance of detached and dispassionate scholarship, conducted at the highest level of reasonableness we can attain, in the work of social reform, and the reform of law.

Perhaps the point is easier to accept if we view the problem of enforcing morals not in the perspective of criminal law, which deals with prohibited conduct, but in that of more affirmative action to accomplish moral purposes through law. Men often say that one cannot legislate morality. I should say that we legislate hardly anything else. All movements of law reform seek to carry out certain social judgments as to what is fair and just in the conduct of society. What is an old-age pension scheme but an enforcement of morality? Does not the income tax, for all its encrusted technicality, embody a moral judgment about the fairness of allocating the costs of society in accordance with ability to pay? What other

meaning can be given to legislation about education and trade unions, betting, public housing, and a host of other problems?

To accept the proposition that law is founded on a collective code of common morality does not weaken the individual's responsibility for reaching moral judgments, and his obligation to help see them fulfilled. That view of law does not diminish the burden of freedom for man, nor permit him to retreat into blind, subjective deference to the code of his tribe. There is nothing in Sir Patrick Devlin's formulation, or in sociological jurisprudence generally, to prevent the law that is from evolving into the law we think it ought to become, or to make the serious student of ethics yield without a struggle to the prejudices of the man on the Clapham omnibus.

PREJUDICE AS A TEST OF INTENT TO DEFRAUD

R. N. Gooderson

When Lord Denning declares that a case decided in 1849 by a lower court is decisive to his mind, as his Lordship did of *R.* v. *Toshack*,[1] in delivering judgment in the House of Lords in *Welham* v. *D.P.P.* (1960),[2] it goes without saying that his Lordship is satisfied not merely that the old ruling ought to be followed out of deference to the maxim *stare decisis*, but also that despite the elapse of over a century it has remained appropriate under modern conditions. Yet the unanimous decision of the House of Lords that intent to defraud, the mental element required for forgery of a private document, may exist without an intent to inflict economic loss, is at variance with current academic opinion, expressed over the last decade.[3] Writers had refused to accept the judicial view that there could be an intent to defraud, provided that a course of action was thereby induced, even though the deceit in question was not designed to result in any deprivation of property. The object of this article is to welcome the House of Lords' decision, as in accordance with the historical background of the law of forgery, both in England and in other countries that have been influenced by English principles, and further as based upon good sense. At least one critic is already pleading for legislation to change the decision,[4] but even on this view there is something to be said for an attempt to examine the full implications of a decision that is in the meantime supremely authoritative.

1. The Common Law and its Influence in South Africa and India

In seeking to establish the respectability of the historical antecedents of the decision, a beginning must be made with the "decisive" case of *Toshack*.[5] T. was indicted for forging a letter purporting to have been written by the master of a ship, testifying

1 (1849) 4 Cox 38.

2 44 Cr.App.R. 124, 154; [1960] 1 All E.R. 805, 815.

3 Turner as editor of *Russell on Crime*, 10th ed. (1950), 1476–1487, and 11th ed. (1958), 1421–1430, and of Kenny, *Outlines of Criminal Law*, 16th ed. (1952) and 17th ed. (1958), para. 377; Glanville Williams, *Criminal Law* (1953), 76–7; Fridman [1958] Crim.L.R. 503; [1960] Crim.L.R. 530.

4 Fridman [1960] Crim.L.R. 530.

5 Note 1, *supra*.

to more than two years' meritorious service by T. as an able seaman on his vessel. Armed with this letter, T. sought from the Corporation of Trinity House a certificate of fitness to act as master. The indictment contained numerous counts, some of which alleged an intent to obtain a piece of paper value one penny, the certificate. The Court for Crown Cases Reserved, however, upheld T.'s conviction only on counts 7 and 9, which did not refer to the piece of paper,[6] but merely averred an intent to deceive, injure, prejudice and defraud, in count 7, William Pixley and others, the examiners appointed by the Corporation, and in count 9, the Corporation itself. The decision was based on the deception practised upon the Corporation and its examiners, they having an important public duty to perform. Apart from the piece of paper, omitted from the vital counts, there was no intent to deprive the Corporation or the examiners of any property.

Another case discussed by Lord Denning is *R.* v. *Sharman* (1854).[7] The conviction of S. for uttering a false letter of recommendation from a Leicestershire rector to obtain the emoluments of the place of schoolmaster at a parochial school in Yorkshire was upheld by the Court for Crown Cases Reserved. The only possibility of economic loss was that the stipend might be paid to an unworthy schoolmaster, but Lord Denning observes that S. may have intended to render full service,[8] and payment would then be for services of like value. Further in *R.* v. *Hodgson* (1856), counsel for the accused referred to *Sharman* as a case where the uttering would be to the prejudice of the other candidates for the post and of the scholars,[9] but neither of these classes of persons would suffer any economic loss.

Writing in 1883, Fitzjames Stephen explained intent to defraud in forgery as " intent to deceive in such a manner as to expose any person to loss or risk of loss," [10] and, in another passage dealing with this intent in general terms, as " either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of . . . deceit. . . ." [11] Both these definitions are ambiguous in relation to the controversy in question, but the former was instrumental in leading the South African courts to reject the test of economic loss. Under Roman-Dutch law, forgery is only one form of *crimen falsi*, the wilful

[6] See *Welham*, 44 Cr.App.R. 124, 131, 143, 155; [1960] 1 All E.R. 260, 266; 805, 809, 815.
[7] 23 L.J.M.C. 50.
[8] 44 Cr.App.R. 124, 154; [1960] 1 All E.R. 805, 814.
[9] 25 L.J.M.C. 78, 79. [10] *History of the Criminal Law*, Vol. 3, 187.
[11] *Ibid.* Vol 2, 121: cited by Hilbery J. in *Welham* in the C.C.A., with the comment that there is no suggestion of *economic* loss: 44 Cr.App.R. 124, 131; [1960] 1 All E.R. 260, 265.

perversion of the truth with intent to defraud, causing prejudice actual or potential, but within this framework some principles of the English law of forgery have been adopted, and under this name it has tended to achieve an independent existence.[12] In *R.* v. *De Vos* (1899), where the accused was charged with forging a permit from A to enable A's native servant to obtain brandy, contrary to the law forbidding the supply of liquor to a native, Solomon J. conceded that his first thought was to interpret " defraud " as involving deprivation of money or money's value, but he was persuaded to the contrary by Stephen's definition.[13] He held the risk of criminal prosecution to which the barman was exposed to be sufficient prejudice. In *R.* v. *Jolosa* (1903), J. was charged with supplying forged passes to his fellow-servants, native subordinates, certifying that they had been discharged by their common master, whereby they were enabled to leave the Cape, and go to the Transvaal. The court were referred to *Toshack*,[14] and held that there was prejudice to the master. Solomon J. regarded the English authority as conclusive, and Innes C.J. approved *De Vos*, saying that prejudice need not be monetary, and that a man's good name and reputation are of more value to him than his purse.[15]

Near the turn of the century, the case of *Toshack* was exerting a similar influence in India. There a criminal code was in force, but in its interpretation the courts were swayed by English case law. In 1896 a Full Bench of the Calcutta High Court followed *Toshack* on facts identical, except that the false document was used by the prisoner merely as a preliminary qualification entitling him to present himself for examination for a certificate to act as engine driver of a seagoing steamer. The court held that an intent to deprive of property was not necessary, and it is significant that no reference whatever was made to the fact that the ultimate object of the accused was to obtain a piece of paper of some economic value.[16] In 1893 Edge C.J. in the Allahabad High Court had ridiculed restriction of the crime of forgery to cases of economic loss in this cogent dictum: " Why should the making of a false document to support a claim to an old coat not worth Rs.5 be a forgery, and making a false claim to custody of a child be not? " [17]

12 C. W. de Villiers in (1935) 52 S.A.L.J. 143, 145.

13 13 E.D.C. 145, 150. In an English case, R. S. Wright J. apparently regarded a policeman who made a false permission from his superior to obtain liquor as guilty of forgery: *Sherras* v. *De Rutzen* (1895) 64 L.J.M.C. 218, 221.

14 Notes 1, 5, *supra*.

15 (1903) 694, 698, 699. The remarks of Innes C.J. are *obiter*: the master's reputation was unaffected, but the judge has in mind the risk of prosecution to which the barman was exposed in *De Vos*.

16 *Q.E.* v. *Abbas Ali*, 25 Cal. 512.

17 *Q.E.* v. *Soshi Bhushan*, 15 All. 210, 217.

2. The Forgery Act, 1913, and Subsequent Developments

In 1903 Buckley J., as Lord Wrenbury then was, a Chancery judge and an expert on company law, took advantage of an opportunity rare in his milieu to make a contribution to criminal jurisprudence. He had to decide whether a prima facie case had been made to justify his ordering the Official Receiver to conduct a criminal prosecution under sections 83 and 84 of the Larceny Act, 1861, and section 166 of the Companies Act, 1862, against Whitaker Wright, the former managing director of a company engaged in a highly speculative business, and then in liquidation. Two of the relevant sections were satisfied by an intent to deceive or defraud, but one required an intent to defraud.[18] No doubt for this reason, Buckley J. prefaced his judgment by differentiating between these two intents. He said:

> "To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind: to defraud is by deceit to induce a course of action." [19]

These quotable remarks were seized upon by the editors of Archbold for the 1905 edition,[20] and placed the author in the limelight. They were approved by the Court of Criminal Appeal in 1913.[21] In the same year, the Forgery Act was passed, whereby the requisite *mens rea* for forgery became in the case of private documents an intent to defraud, and in the case of public documents an intent to deceive.[22] The judicial recognition of the distinction drawn by Buckley J. did not come until over two months after the Forgery Act was passed, and in a case not of forgery but of false pretences.[23] It seems therefore only proper that the House of Lords should refuse to regard the words of Buckley J. as authoritative in the interpretation of the Act.[24] In 1931 the Court of Criminal Appeal did, however, in interpreting that very statute, draw the line between deceiving and defrauding as Buckley J. had done. The court upheld the conviction of one Bassey, who had obtained admission to the Inner Temple by means of false testimonials and examination certificates. It was held that the intent to induce the Benchers to act to their detriment by admitting one, whom it would have been their

18 24 & 25 Vict. c. 96, s. 83—intent to defraud; s. 84, *ibid.*—intent to deceive or defraud. 25 & 26 Vict. c. 89, s. 166—intent to deceive or defraud.
19 *In re London & Globe Finance Corporation* (1903) 19 T.L.R. 314, 317.
20 23rd ed., 590.
21 *R.* v. *Newton* (1913) 9 Cr.App.R. 146.
22 3 & 4 Geo. 5, c. 27, s. 2 and 3.
23 An intent to defraud is the requisite *mens rea* in the crime of obtaining by false pretences, and also that of falsification of accounts: see note 34, *infra*.
24 *Per* Lord Radcliffe: 44 Cr.App.R. 124, 144; [1960] 1 All E.R. 805, 809.

right and duty to refuse, amounted to an intent to defraud, although the Benchers sustained no loss.[25]

There seems to be no judicial or textbook utterance that economic loss is a necessary element in the intent to defraud, until the début of Mr. Turner as an editor of textbooks on Criminal Law in 1950.[26] The treatment in both his editions of Russell in 1950 and 1958 is similar. In the later edition, he states that at common law prejudice in the form of some economic loss was required,[27] cites *Toshack*, stressing the penny paper counts, though these were ignored by the appellate court,[28] and after referring to other cases, concludes that they "go to show that what was in mind was the causing of some economic loss to some person."[29] One of the cases cited in Russell to illustrate intent to defraud, the facts being detailed without comment, is *R.* v. *Peter Martin*. The prosecutrix employed M. as superintendent of her tanning business. He stole some of her money, and made out a false receipt from a fictitious third party to account for it. He was charged with forgery, and his counsel argued that there was no evidence of intent to defraud the prosecutrix, as she had already parted with the money. Patteson J. reserved the point,[30] but the judges decided it was forgery. Economic loss is not obvious, in fact in *Welham* Lord Denning treated it as a case where there was no intent to deprive the employer of anything.[31] Counsel for the Crown in *Welham* argued that Martin's employer was deprived of her right to prosecute,[32] and by analogy Welham had an intent to defraud, in that he intended to deprive the Capital Issues Committee of the right to prosecute.[33] This would not be *economic* loss. Dealing with another case of a dishonest servant, Mr. Fridman argues that

25 Actually the Inn lost £100 in fees through the deceit, as appears from the statement of facts in (1931) 47 T.L.R. 222, 223, but this was not observed until the Court of Appeal of East Africa drew attention to it in *Woodgate* v. *R.* (1959) E.A. 525, 529. The fact was not relied upon in the judgment of the court in *Bassey*, nor did it weigh with the East African court, who held Woodgate guilty of falsification of accounts because by his deceit he induced his employers to a course of inaction. For a full discussion of the case, see Fridman (1960) Crim.L.R. 530–533.

26 Note 3, *supra*. However in the House of Commons on February 2, 1904, Sir Robert Finlay, Attorney-General, as Viscount Finlay then was, in attempting to explain his failure to institute a prosecution of Whitaker Wright, ultimately prosecuted by order of Buckley J. (note 18, *supra*), defined defrauding for the purpose of section 84, Larceny Act, 1861, as "to mislead persons on questions of fact with a view to prejudicing them pecuniarily," *Hansard*, Vol. 129, Col. 163.

27 p. 1422.

28 Note 6, *supra*.

29 p. 1428.

30 (1836) 7 C. & P. 549, 551. Referred to in Russell, *op. cit.*, 1425.

31 44 Cr.App.R. 124, 154; [1960] 1 All E.R. 805, 815.

32 *Ibid.* at p. 137.

33 For the facts of *Welham*, see the para. following note 48.

the employer might suffer economic loss from failing to take steps to recover the stolen property, or from continuing payment of wages to a dishonest servant.[34] *Martin's* case is perhaps indecisive, but at its face value is contrary to Mr. Turner's view.

When Mr. Turner deals with the dictum of Buckley J., he suggests that it was misinterpreted in *Bassey* [35] because of a logical blunder.[36] This is a matter on which different opinions may be held, but the *Bassey* interpretation accords with the decision in *Toshack*, and with developments in South Africa and India substantially contemporaneous with the 1903 dictum.[37] In any event, the exact shade of meaning that Buckley J. intended to convey is unimportant: his words are not to be construed as authoritative in themselves, like an act of the legislature, demanding ascertainment of the intention of Parliament. Even had his words been *ratio decidendi*, and they were clearly *obiter*,[38] the vital matter is the construction placed upon those words by subsequent courts. Whatever Buckley J. intended, subsequent courts, one of them a higher court,[39] in *rationes decidendi* have regarded his words as negativing the need for economic loss.

Mr. Turner concludes this section by the quotation from Stephen already cited.[40] It has been suggested above that this is ambiguous, but in South Africa it resulted in the rejection of the idea that the loss must be economic.[41]

In his editions of Kenny in 1952 and 1957, Mr. Turner has changed the view of the author that pecuniary detriment was not necessary, to his own theory to the contrary.[42] The relevant section is terminated by a sub-paragraph, introducing with approval *R.* v. *Parker*.[43] Yet it is submitted that although Ridley J. held that there could be an intent to defraud, no economic loss was suffered, and there was no evidence of any intent to cause such loss. Parker,

34 (1958) Crim.L.R. 503, 509–510, referring to *Wines* (1953) 2 All E.R. 1497, a charge under Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24), s. 1, which also requires an intent to defraud. The dictum of Buckley J. was not only followed, but received the title of *locus classicus* from Goddard L.C.J. (1498).

35 Note 25, *supra*.

36 p. 1429.

37 Notes 13–17, *supra*.

38 In *Welham*, this is stated by counsel for W. (44 Cr.App.R. 124, 134), by counsel for the Crown (137) and by Lord Radcliffe (144).

39 In *Bassey*, note 25, *supra*.

40 Note 10, *supra*. See Russell, *op. cit.*, p. 1430, where it is said that Stephen was writing of the intent in larceny, whereas he was dealing with forgery.

41 Note 13, *supra*.

42 Kenny, 12th ed., 263. In the Turner editions, *cf.* para. 377, requiring economic loss.

43 (1910) 74 J.P. 208. Kenny referred to this case only on the meaning of document, and not on the question of intent: 13th ed., 258.

a moneylender, had lent money to Page, a naval rating. To expedite repayment, he wrote his debtor a false letter, purporting to come from the naval authorities, enjoining him to repay. Page gave evidence at Parker's trial for forgery, and stated that he had never suggested that Parker had defrauded him, that he did not complain of the interest charged, and regarded the balance as still due from him, and would pay it when the case was over.[44] Nevertheless the judge directed the jury that if a man insists upon payment of a debt which is due to him, and for this purpose resorts to a forged instrument, that would afford evidence of intent to defraud. It is, however, submitted that if I liquidate a just debt I suffer no economic loss. In my personal balance sheet, the amount of cash in hand on the credit side is reduced, but this is offset by a corresponding reduction on the debit side in the item "sundry creditors." It is true that it is the intention of the accused, his state of mind that is material, and not the state of mind of his victim. The lender may know or erroneously believe that there is some legal defect in his claim to repayment, and therefore bolster it up by false documents, or he may believe that his debtor is unable to pay all his debts, and seek by false documents to press his debtor to pay him in preference to other creditors. In either case, there would be an intent to defraud,[45] but there was no evidence that Parker was actuated by any such motive.

Despite the emergence of the new academic view, Paull J. followed *Bassey* in *R.* v. *Potter.* William, a qualified driver, masqueraded as his brother Alan at Alan's driving test, so that Alan should obtain a full licence. William was convicted of forging two documents that he had signed in Alan's name in the presence of the examiner after the test, a certificate of competence to drive, and an entry in the examiner's journal. The judge did not refer to the danger of the slaughter of innocent pedestrians,[46] but found the intent to defraud in the intent to induce the county council to a course of action, to wit issuing a licence.[47] In *R.* v. *Garland*, G., a policeman and learner driver, was involved in a collision when driving unaccompanied and without L plates. He made a false document, purporting to be signed by a colleague, to the effect

44 152 C.C.C. Sess. Pap. 321.

45 Lord Denning expressly held in *Welham* that the intended victim need not be the person to whom the false document is first presented: see note 70, *infra.*

46 Whereby an analogy, bearing on this case, could have been drawn from the remarks of Erle J. in *Hodgson*: note 59, *infra.*

47 [1958] 2 All E.R. 51, 55. The judge also relied on the obtaining of the piece of paper, the licence, and those who require economic loss clutch at this. Each ground of decision forms a *ratio decidendi*: *Jacobs* v. *L.C.C.* [1950] A.C. 361, 369 (H.L.).

that his full licence had been inspected. It was held that there was intent to defraud, as he thereby caused the police to refrain from prosecuting him.[48]

3. The Case of Welham *v.* D. P. P.

In the case of *Welham* itself, W. was charged with conspiracy to defraud certain finance companies, and with uttering bogus hire purchase agreements with intent to defraud. He was acquitted of conspiracy, as he managed to convince the jury that one P. had represented to him that the finance companies were only too anxious to lend money, which would otherwise lie idle because of the credit squeeze. W. admitted that his object was to defeat the credit restriction regulations, and that the false documents were to pull the wool over the eyes of any one investigating the books of the finance companies. His original intention was to defeat the regulations, later he learned of the Capital Issues Committee and intended to deceive them, but he never appreciated that the persons in fact deceived would be inspectors from the Board of Trade.

The House of Lords held that Welham's plan amounted to an intent to defraud. Of the five members of the court, only Lord Radcliffe and Lord Denning delivered full judgments. That of Lord Denning contains the *ratio decidendi*, because Lord Radcliffe expresses agreement with him, and so does Lord Tucker. The other two members, Lord Keith and Lord Morris, express agreement in general terms. Lord Radcliffe's proposition of law is narrower than that of Lord Denning. Lord Radcliffe considers that there is intent to defraud, where there is intent to deceive "a person responsible for a public duty into doing something that he would not have done but for the deceit or not doing something that but for it he would have done."[49] His Lordship is referring to *Toshack*, and is closely following the words of Alderson B., when the latter adverts to "a very important public duty which the Corporation of Trinity House have to discharge."[50] The Buckley test is therefore accepted only where the course of action induced by deceit is that of a person responsible for a public duty. Subject to this qualification, however, the Buckley test is extended to cover inducing a course of inaction.

[48] (1960) Crim.L.R. 129, Bedfordshire Q.S. Mention was also made of the economic loss to the public caused by escaping the fine, and there was also evidence that but for his deception G.'s promotion would have been delayed: he therefore intended to obtain additional wages and cause economic loss thereby.

[49] 44 Cr.App.R. at p. 143; [1960] 1 All E.R. at p. 809.

[50] Notes 1, 5, *supra*.

Lord Denning frames a wider proposition in these words:

> " Put shortly ' with intent to defraud ' means ' with intent to practise a fraud ' on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough." [51]

The House of Lords examined the arguments in favour of restricting the meaning of defraud to economic loss, and rejected them. One that gave their Lordships pause was that without this limitation there would be little difference between intending to deceive and intending to defraud, whereas Parliament in 1913 clearly intended there to be a difference by enacting that the former intent sufficed in the case of public documents but not for private documents. Once their Lordships were satisfied that even without this limitation some sphere of operation would remain for deceit that was not defrauding, they were content, and it is submitted rightly so. As Stephen said: " In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent." [52] The intention of Parliament may well have been to cast the net only a little more widely in the case of public documents.

Their Lordships did not agree that in common parlance to defraud means to inflict financial loss, and they disposed of some of the hypothetical cases put forward by writers to illustrate the absurdity of a wider definition by recalling that there is a maxim *de minimis*, and that courts do exercise common sense.[53]

One of the surprising features of the academic attempt to stem the tide of judicial decision was that, despite the novelty of the view, little of substance was said to justify it during its short life of ten years, before it was engulfed in *Welham*. Now that the House of Lords has said the final word, Mr. Fridman has come forward with some reasons for legislation to reverse the decision. He considers that the new definition is too elastic, and may lead to

51 44 Cr.App.R. at p. 155; [1960] 1 All E.R. at p. 815. From one viewpoint, this proposition is too narrow: there may be intent to defraud even though it is impossible for anyone to be defrauded: *Nash* (1852) 21 L.J.M.C. 147, 149, and comment in (1952) 15 M.L.R. 11, 15.

52 *Op. cit.*, Vol. 2, 122.

53 The hypothetical case put by Glanville Williams, *op. cit.*, 76, is of a forged letter to induce the prosecutor to walk to a certain spot. In South Africa, Wessels J. set aside a conviction for forgery on the ground of *de minimis*. S. saw a strange cow on his farm. M. produced a false receipt to show it was his. The judge said that the prejudice must be such that courts could take notice of, and that " the deceit may be for the sole purpose of getting over some unimportant temporary difficulty or of hiding some fact which is of no consequence to any other individual or to the community ": *R.* v. *McLean* (1918) S.A.L.R. 94, 97 (T.P.D.). Mason J. was not so sanguine: he regarded M.'s conduct as highly suspicious: *ibid.* 100.

injustice, that an offence against property should be confined to action directed against property,[54] and that it seems incongruous to extend intent to defraud to cover cases of physical harm, social injury, ostracism and disapproval of society.[55]

As to physical harm, Mr. Turner seems to share his doubts: he ridicules the idea that to deceive a man into drinking poison by representing it to be water is to defraud him.[56] But in this situation, there is intent to defraud by Mr. Turner's own test in nine cases out of ten. Such action is almost certain to produce economic loss. If the victim is a wage earner and dies, his dependants will suffer economic loss, while if he lives there will be his loss of earnings. If the victim is not a breadwinner and dies, there will be his funeral expenses, and if he lives, at least the shilling cost of a National Health prescription.[57] The only way of escape for the deceiver under Mr. Turner's test would be to plead that it never occurred to him that these economic losses would flow from his conduct, and it will not be easy to satisfy the jury on this point.[58] To my mind, it should be forgery to make a false document intending to cause physical harm. Suppose A sends pills which he knows to be poisonous to B, and writes a covering letter purporting to come from B's doctor: "These pills are quite harmless. Take them in a little water." It is submitted that A has made and uttered a false document with intent to defraud. In *Hodgson*, Erle J. did refer to the danger of the slaughter of paupers that might follow from the assumption of false medical qualifications, to equate the position with the danger to life if men like Toshack had control of a seagoing ship.[59] This is some indication that an intent to endanger life may be an intent to defraud, though no doubt the judge had in mind the injury to the public, rather than to individuals.

Questions of social injury, ostracism and the disapproval of society were considered by the High Court of Mysore in *Siddappa* v. *Lalithamma* (1954).[60] The accused S. had printed false wedding invitations, announcing his coming marriage with L., a young heiress. The invitations were circulated to relatives and to the Press under the name of the maternal uncle of L., and thus satisfied

54 (1960) Crim.L.R. 530, 537. An intent to commit rape is however sufficient *mens rea* for burglary.
55 *Ibid.* p. 533.
56 Russell, 11th ed., p. 1429.
57 The devotees of economic loss are content if there is deprivation of a scrap of paper: notes 28, 47, *supra*. They would not dispute a conviction if the forger's intent was to deprive of as much as a shilling.
58 The accused will probably be faced with the presumption that a man intends the natural consequences of his acts: note 78, *infra*.
59 (1856) 20 J.P. 309, 310.
60 A.I.R. (1954) Mysore 119.

the requirement of falsity, because they not merely conveyed false information but also told a lie about themselves.[61] The necessary intent to be proved under section 463 of the Indian Penal Code was " to cause damage or injury to any person." Under section 44, " injury denotes any harm whatever illegally caused to any person in body, mind, reputation or property." The court held the requisite intent to have been proved, since L. would suffer in public estimation, and also be under a cloud with her own relatives, for S., a much married man, had once married L.'s elder sister. They further held that L.'s prospects of securing a suitable match in future were diminished. This decision was based on the provisions of a code, founded upon the English common law. In Roman Dutch law also damage to reputation and honour is sufficient prejudice for any form of *crimen falsi* including forgery.[62] In my view, a definition of forgery that covers such cases is not too elastic nor is it incongruous. Rigid definitions have been a bugbear in English criminal law, provoking judges to stretch them out of all recognition to protect the innocent and to punish the wrongdoer.

In Scotland, a leading textbook regards a false announcement of a death made to prevent a relative from voting as issued with intent to defraud.[63] Loss of the opportunity to vote is not pecuniary loss, but the deprivation of such a right should be visited with the same penalty as deprivation of property if the purpose is furthered by a false document. Reference may again be made to the case put by Edge C.J. of a false document to sustain a claim to custody of a child.[64] There might well be no economic loss: custody of the child might involve expenditure, but the loss would be none the less real though not measurable in terms of money.

It is now clear from *Welham* that while deprivation of property is not the criterion of intent to defraud, an intent to induce a course of action or inaction will suffice only if this is likely to involve some real deprivation or injury.[65] Depriving of the right to prosecute is clearly defrauding.[66] Presumably there would be an

61 Kenny, *op. cit.*, 17th ed., 355.

62 Carpzovius, a 17th-century German jurist, freely cited in South Africa; *Jolosa* (note 15, *supra*); *Macatlane* (1927) S.A.L.R. 708, 712 (T.P.D.) (note 75, *infra*); *Seabe* (1927) A.D. 28, 33, alluding to the fact that a licensed dealer who supplied liquor to coloured persons might be held in bad odour by his neighbours; *Leballo* (1954) 2 S.A.L.R. 657, 660, citing *Dhlamini* (1943) T.P.D. 20, 23.

63 Macdonald, *Criminal Law of Scotland*, 5th ed. (1948), 61.

64 Note 17, *supra*.

65 *Per* Hilbery J. in the C.C.A.: 44 Cr.App.R. at p. 128. In the H.L., Lord Radcliffe was not so specific, but he did say that " to defraud must involve something more than the mere inducing of a course of action by deceit "; *ibid.* 145.

66 *Per* Hilbery J. *ibid.* at p. 133. This is implicit in the decision in the H.L. See also *Garland* (note 48, *supra*), and in South Africa, *Lin Yunn Chen* (1908) Transvaal L.R. 634, where L., who forged a signature to a gang sheet, which

intent to defraud if there were intent to deprive of the right to sue. In the Australian case of *Leishman*, L. forged marriage lines to pacify the father of the girl with whom he intended to cohabit.[67] This was held to be forgery as the document was public, as in England,[68] and intent to deceive sufficed. Apart from this, it seems that the intent may well have been to deprive the father of the right to sue L. for seduction, if he could prove loss of services. It has been suggested elsewhere that if *Robert Martin*, the accused, who signed a cheque " William Martin " in payment for a pony and chaise, intended by using a false Christian name to deprive the seller of his right of action on the cheque, as Cockburn C.J. surmised, he would have the requisite intent to defraud.[69]

Another point decided in *Welham* is that the intended victim of the fraud need not be the person to whom the false document is first presented. Welham presented the bogus document to the finance company, but had no intent to defraud them.[70] This decision, apparently the first of its kind in England, is a welcome one. The law of forgery should cover cases of deceiving A with intent to defraud B, as in the Mysore case, where the intent was to deceive the persons invited to the wedding and the Press, but to defraud the young heiress.[71]

4. Trends in South Africa

Professor J. C. Smith, who regards the restriction of intent to defraud to cases involving economic loss as too narrow, considers that intent of the accused to benefit should suffice irrespective of

represented that two coolies, in fact absent without permission, had been at work and had drilled so many holes, was convicted of forgery, the requisite prejudice being that to the master who was deprived of the right of prosecuting the absentees.

67 (1943) V.L.R. 83.

68 Forgery Act, 1913, s. 3(2)

69 (1880) 14 Cox 375, considered in (1952) 15 M.L.R. 11, 15, 16. A belief that he would thus escape liability would of course be erroneous. There happened to be a William Martin, an actual customer of the same bank; but this was unknown to the accused: 14 Cox at p. 377. In a Transvaal case, where the facts were similar, but the accused did know of the person whose name was used, the English case was distinguished, and he was held guilty of forgery, the prejudice consisting in the risk to the third person of being sued on the cheque: *Sedat* (1916) S.A.L.R. 431, 433 (T.P.D.).

70 *Per* Lord Denning: 44 Cr.App.R. 124, 156; [1960] 1 All E.R. 805, 816. *Sharman* (note 7, *supra*) would be such a case on the interpretation placed on it by counsel for the accused in *Hodgson* (note 9, *supra*)—testimonial uttered to deceive the appointments committee, but to defraud the other candidates for the post. For India, see *Soshi Bhushan* (note 17, *supra*)—false document to provide a quick passage into the second year law class at Queen's College, Benares, presented to the Principal to deceive him, but to defraud the law professor of his fees.

71 Note 60, *supra*.

any intent to cause loss.[72] It is submitted that this test goes too far. It is supported by at least one dictum,[73] but in *Welham* Lord Radcliffe seems to take the opposite view.[74] Surely common parlance is against the view that merely to obtain benefit without inflicting loss is to defraud. Without any such gloss, the criterion of prejudice, adopted by Lord Denning in the majority judgment, is a wide one, as is illustrated by developments in South Africa, where this very expression is used to describe the consequences that must follow. In situations of the *Bassey* type, it has there been held that there is prejudice to the alleged writer of the testimonial, since his reputation may suffer from his apparent support of a worthless candidate.[75] An imposture practised to deceive an examiner of motor-vehicles has been held prejudicial to him [76]: the analogy in the English case would be a finding that the reputation of the driving examiner might suffer from seeming to have passed Alan Potter, perhaps the veriest tyro.[77] Such South African decisions have been criticised by C. W. de Villiers on the ground that insufficient attention was paid to the question whether the accused actually *intended* prejudice to the alleged victim.[78] Did Bassey ever consider for one moment the reputation of the principal of the college of Sierra Leone, whose signature was forged on the testimonial he uttered? Did William Potter wonder whether brother Alan's driving was such as to impair the credit of the examiner who had supposedly passed him? The danger of wholesale imputation of intents to an accused is likely to arise in England

72 (1960) Crim.L.R. 131, a note published after the C.C.A. decision in *Welham*, but before that of the H.L.

73 *Per* Williams J. in *Sharman* (1854) 23 L.J.M.C. 50, 52. Fridman criticises this view: (1960) Crim.L.R. at pp. 540–541.

74 " Although it is almost invariably associated with obtaining an advantage it is the effect on the victim that ultimately determines its meaning ": 44 Cr.App.R. at p. 141.

75 *Macatlane* (1927) S.A.L.R. 708—M. had eight previous convictions. *Leballo* (1954) 2 S.A.L.R. 657—L. a schoolmaster had been dismissed by the Education Department from a school where the testimonial said he had acted with great ability. If the false testimonial is shown to represent with fair accuracy the actual opinion of the apparent signatory, it has been held there is no prejudice to the latter: *Dhlamini* (1943) T.P.D. 20.

76 *R.* v. *John* (1931) S.A.L.J. 83. See also the cases where risk of prosecution of the dupe has been held prejudice to him: note 13, and *Seabe* (1927) note 62, *supra*. Qu. whether in South Africa, prejudice to the finance company in a case like *Welham* could be found in the risk of prosecution.

77 Note 47, *supra*.

78 (1935) 53 S.A.L.J. 143, 150, 159, 163–164. In *Seabe* (1925) S.A.L.R. 327 (T.P.D.), he was prosecuting, as Attorney-General, in a typical false liquor permit case. He conceded that S. never contemplated the kind of prejudice arising to the licensed dealer from supplying a native (330), but Tindall J. held that if such prejudice was the probable consequence of the accused's misrepresentations, that was sufficient: in contemplation of law he might be said to have intended such prejudice: *ibid.* 331.

only if an undue use is made of the maxim that a man is presumed to intend the natural consequences of his acts.[79]

De Villiers also expresses concern at the way the courts have considered the possibility of prejudice, without regard to the capacity of the act of the accused to cause it. In *De Vos*, Barry J.P. held that the master of the servant, who had obtained brandy on a false permit prepared by the accused, might be prejudiced as the brandy would render the servant's services less valuable.[80] De Villiers argues that if the servant were incapacitated by the drink, the cause of this would be her intemperance, and not the accused's forgery.[81] It is submitted that everything depends upon proof of the intention of the accused. If I deliberately provide A's servants with false liquor permits, purporting to be signed by A, intending that they shall become inebriated, and leave A without domestic help, I certainly have an intent to defraud, but it is to be hoped that this will not be assumed to be my intention, merely because of the accommodating maxim that I am presumed to intend the natural consequences of my acts.

De Villiers was also disturbed by South African decisions that an intent to defeat state regulations amounted to an intent to defraud.[82] In this context, he distinguishes between the special interests of the state as custodian of state property, and its general interests as guardian of the collective interests and welfare of its subjects. He regards prejudice to the state in its former capacity as sufficient to support a charge of *crimen falsi*. An illustration would be *Moolchund* v. *R.*, where M. falsely pretended that he had suffered losses in the Boer War to obtain compensation from the Colonial Government.[83] He would presumably approve of the decision that there is intent to defraud where petrol is obtained on false coupons, during a period of rationing when the state is seeking to conserve supplies.[84] His view is, however, that where only the general interests of the state are involved, and a false pretence or document is made with intent to enable a person to evade detection in transgressing a statutory or other legal prohibition, the only detriment to the public interest would be due to the transgression itself, and not to the manner of committing it.[85] Since he

[79] See Glanville Williams, *op. cit.*, 77.

[80] (1899) 13 E.D.C. 145, 148–149. This was a case where one of Stephen's definitions was approved: note 13, *supra*. The tendency in South Africa to *assume* intentions on the part of the accused may spring in part from the influence of Stephen's definitions (notes 10 and 11, *supra*), in that in each one stress is laid on the need for loss or injury, and the point that the accused must intend to cause that loss is glossed over.

[81] *Op. cit.*, 150–151.

[82] *Ibid.* p. 163–164.

[83] (1902) 23 N.L.R. 76.

[84] *R.* v. *Frankfort Motors* (1946) O.P.D. 255.

[85] *Op. cit.*, 165, 168.

wrote, this view has been rejected in South Africa.[86] De Villiers seems to ignore the special loss to the state arising from non-detection, and consequential non-payment of fine. Further the additional element of attempting to conceal the offence should not be disregarded. The police officer Garland surely merited punishment beyond that for infringing the Road Traffic Act by driving unaccompanied and unheralded when a learner driver, by virtue of the elaborate deception supported by false documents.[87] The offence of misprision of felony is a recognition by the law that concealing an offence must sometimes be punished as well as actually committing it. *Welham* is certainly a clear authority that in England an attempt to conceal liability to prosecution by false documents is forgery.

In conclusion it is suggested that a workable definition of the intent relevant to the forgery of private documents, in more specific language than that used by Lord Denning, might run as follows:

" An intent by deceit to cause prejudice to another either:
(i) by causing damage to his person, property or reputation; or
(ii) by affecting his rights whether by deprivation or concealment thereof; or
(iii) by inducing him to act contrary to what would have been his duty had he not been deceived."

[86] *R.* v. *Heyne* (1956) A.D. 604, 624 (Appellate Division).
[87] Note 48, *supra*.

THE CHANGING USE OF "SPECIAL DAMAGE" AND ITS EFFECT ON THE LAW

J. A. Jolowicz

The rules of the substantive law of damages on the one hand and the rules of pleading on the other ought to be kept strictly apart, for although a faulty pleading, if not amended in time, may deprive a plaintiff of compensation for some part of his damage as effectively as a decision that the damage is too remote, the substantive law can only be rationally considered on the assumption that any case coming under discussion has been properly pleaded. It should follow, therefore, that the distinction between special and general damages is one solely belonging to the rules of pleading. If an item of special damage has been inadequately pleaded or proved it cannot be recovered, but this is a consequence of failure to comply with those rules. It has no bearing on the substantive law whatever. It does appear, however, that there is at present some confusion as to the nature of the distinction between special and general damages and that this confusion is indirectly affecting the substantive law in certain types of case—notably actions for damages for personal injury.

Early Meaning

The original use of the term "special damage" was, almost certainly, to describe the damage which a plaintiff must plead and prove in certain cases if he is to show that he has a cause of action at all.[1] In *Iveson* v. *Moore*,[2] for example, Gould J. said, "The objection against this action is, that it is founded upon a matter which is a public nuisance, and that the plaintiff has received thereby no special damage, that is to say, no damage more peculiar to himself that any other of the King's subjects. . . ."

In this sense "special damage" is clearly a concept of importance in the substantive law. In certain types of case the plaintiff has no cause of action unless he has suffered special damage. It is contrasted, therefore, with that "general damage" which the law implies in the case of wrongs actionable *per se*. "Every injury,"

[1] The term was also sometimes used to describe damage alleged in the "per quod": *Bourden* v. *Alloway* (1709) 11 Mod. 181; *Scott* v. *Shepherd* (1773) 2 Wm.Bl. 892.

[2] (1699) 1 Ld.Raym. 486, 488. See also *Law* v. *Harwood* (1629) Cro.Car. 140.

said Lord Holt C.J.,[3] "imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is hindred of his right."

This meaning of general damage persists at least until the end of the nineteenth century.[4] Thus Bullen and Leake, in their third edition, state,[5] "Where the act of the defendant complained of is in itself a legal injury to the plaintiff, as a breach of contract or a trespass, the law always implies general damage at least to a nominal amount."

A Rule of Pleading

At the same time, however, another meaning of general damage has come into use, a meaning which at first sight is similar to that already described, but which on examination proves to be very different.

Using the terms in their original senses it is obvious that special damage must be pleaded, for if it is not the pleading will disclose no cause of action, while general damage, being presumed by the law, need not. This rule of pleading, however, does not exist in its own right for it is derived directly from the substantive distinction between wrongs actionable *per se* and wrongs actionable only on proof of damage. It came to be thought, however, that the rule of pleading had an intrinsic value of its own. General damage need not be pleaded, because the presumption that it exists makes it unnecessary for the plaintiff to give notice to the defendant that it will be claimed. "Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage. *By the very fact that he has committed such a wrong, the defendant is prepared for the proof that some general damage may have been done.*"[6] Special damage therefore comes to mean damage which must be pleaded if the plaintiff is to have adequate notice of the case he has to meet.

The significance of the distinction between special and general damage is thus thought of in terms of adjective rather than substantive law, and this has the result that the presumption of

3 *Ashby* v. *White* (1703) 2 Ld.Raym. 938, 955.

4 The term "special damage" is still sometimes used even today to describe the damage a plaintiff must prove in an action for slander, but "actual damage" is now preferred.

5 At p. 12. See also *per* Bowen L.J. in *Ratcliffe* v. *Evans* [1892] 2 Q.B. 524, 528. General damage is, "damage which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby* v. *White*. In all such cases the law presumes that *some* damage will flow from the mere invasion of the plaintiff's rights, and calls it general damage."

6 *Per* Bowen L.J. in *Ratcliffe* v. *Evans* [1892] 2 Q.B. 524, 529. Italics mine.

general damage becomes a presumption of fact instead of a presumption of law. If general damage means damage which need not be pleaded because the defendant will know in any event that it will be claimed, then damage which obviously flows from the act complained of is general damage, whether or not the cause of action arises out of a wrong actionable *per se*. Provided that a cause of action is made out, the plaintiff may recover as general damages (*i.e.*, without specific pleading) all damage which flows naturally from the defendant's wrongful act.

It seems unlikely that this change in the nature of the presumption of general damage was fully appreciated at the time, and even today it is sometimes spoken of as if it were a presumption of law.[7] Nevertheless, by the beginning of this century the distinction between special and general damage is centred upon the nature of the act complained of, that is upon the facts of the particular case, and not upon whether the wrong done by the defendant is actionable *per se*. " ' General damages,' as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of. ' Special damages,' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly." [8]

That general damage may be presumed from the nature of the act complained of does not, of course, alter the rule of substantive law that, except in the case of wrongs actionable *per se*, the plaintiff must prove damage to establish a cause of action. The presumption of general damage cannot, therefore, relieve him of the obligation to plead that he has suffered damage, for otherwise his statement of claim will disclose no cause of action. " If the damage be general, then it must be averred that such damage has been suffered. . . ." [9] But general damage need not be pleaded with particularity. It may be pleaded generally, and the court will not order particulars to be given.[10] On the other hand the plaintiff will not be allowed to give evidence at the trial of any special damage which is not claimed explicitly, either in the statement of claim or the particulars.[11]

On this basis, the distinction between special and general damage belongs wholly to the rules of pleading, and so regarded it

[7] See *e.g.*, Bullen and Leake, 11th ed., p. 38.
[8] *Per* Lord Macnaghten in *Ströms Bruks Aktie Bolag* v. *John & Peter Hutchison* [1905] A.C. 515, 525.
[9] *Per* Viscount Dunedin in *The Susquehanna* [1926] A.C. 655, 660.
[10] *London & Northern Bank Ltd.* v. *George Newnes* (1900) 16 T.L.R. 433.
[11] *Hayward* v. *Pullinger & Partners Ltd.* [1950] 1 All E.R. 581.

has an important corollary. A plaintiff who claims but fails to prove his special damage does not necessarily lose everything. He is merely thrown back on his general damage.[12] Thus in the recent case of *The Hebridean Coast* [13] a collier belonging to the plaintiffs was damaged by the negligence of the defendants and put out of action for 11½ days. The plaintiffs claimed the cost of chartering replacement tonnage as part of their special damage, but failed to prove that replacement tonnage had in fact been chartered. They could not, therefore, recover the damage claimed, but they could and did recover general damages for loss of use.

Exact Calculation

There is, however, another meaning given to the term "special damage," which is also in use today, namely that special damage means damage capable of substantially exact calculation, and it is this meaning which has given rise to a certain amount of confusion. Certain speculations as to the origin of this meaning of the term are offered below, but it receives its clearest formulation in Lord Goddard's speech in *British Transport Commission* v. *Gourley* [14]: "In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings down to the date of trial and is generally [15] capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future."

From this passage, and particularly from the statements that special damage "has to be pleaded and proved" while general damage is damage "which the law implies and is not specially pleaded," it would appear that Lord Goddard considered that he was doing no more than follow the ordinary modern meaning of special and general damage outlined above. With respect, however, he is in truth taking a different distinction. To say that some

12 Bullen & Leake, 3rd ed., p. 13; *Smith* v. *Thomas* (1835) 2 Bing.N.C. 372, 380, *per* Tindal C.J.

13 [1960] 3 W.L.R. 29. Leave to appeal to the House of Lords in this case has been granted. See also *The Susquehanna* [1926] A.C. 655.

14 [1956] A.C. 185, 206.

15 This qualification recognises that there may be an element of uncertainty even in the calculation of the loss of earnings which has already accrued—*e.g.*, because the plaintiff might not have been able to continue earning at his pre-accident rate even if he had not been disabled: see *per* Brett L.J. in *Phillips* v. *London & South Western Ry.* (1879) 5 C.P.D. 280, 291; *Rouse* v. *Port of London Authority* [1953] 2 Lloyd's Rep. 179.

item of damage is not capable of substantially exact calculation is not the same as saying that it can be presumed to flow from the act complained of.[16]

Two Meanings

The position has been reached, therefore, that the term special damage (and so also general damage) has two different meanings, both of which are in current usage. The difference between the two, however, seems to produce different results only in cases of personal injury, for in most, if not all, other types of case damage which is special in the sense that it cannot be presumed will, incidentally, be capable of exact calculation.[17] In *The Hebridean Coast*,[18] for example, the special damage claimed—that is, the cost of chartering replacement tonnage—could obviously be calculated precisely. The assessment of the general damages the plaintiffs actually recovered, however, was in some sort a jury question. As Lord Halsbury said in *The Mediana*,[19] "The broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken, except . . . when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognises as special damage. In that case you must shew it, and by precise evidence. . . . But when we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject-matter then in question." [20]

There is a tendency, therefore, to think of the capacity for exact calculation as being itself the hallmark of special damage, at any rate in actions for personal injury, and this tendency, it is submitted, is beginning to make itself felt outside the confines of the rules of pleading.

Personal Injuries

The leading case on the measure of damages in actions for personal injuries is still the much litigated case of *Phillips* v. *London &*

[16] See *Shearman* v. *Folland* [1950] 2 K.B. 43 for the view that all prospective damage is necessarily general damage—presumably because prospective damage cannot be exactly calculated. It is not the case that all prospective damage can be presumed.

[17] The calculation itself should, in effect, be pleaded with the greatest possible precision in order that the defendant may know the case he has to meet: *Anglo-Cyprian Trade Agencies* v. *Paphos Wine Industries* [1951] 1 All E.R. 873.

[18] [1960] 3 W.L.R. 29. See *ante*, p. 217.

[19] [1900] A.C. 113, 117. See also *per* Viscount Dunedin in *The Susquehanna* [1926] A.C. 655, 660.

[20] This does not, of course, mean that there are no principles for the assessment of general damages. The jury, if there be one, must act under proper direction: *The Chekiang* [1926] A.C. 637, 643 *per* Lord Sumner.

South Western Railway [21] where the plaintiff, a highly successful physician, suffered serious injury as a result of the defendants' negligence. By the second trial two years had elapsed from the date of the accident, and it appeared that the plaintiff would continue to be unable to pursue his profession for a further eighteen months or two years. It was, of course, appreciated that the loss already suffered could be more accurately assessed than that which had not yet accrued,[22] but no suggestion was made that there were here two distinct elements of damage. The jury was simply instructed to assess the damages for the plaintiff's "pecuniary loss," the only separate item of damage mentioned being the plaintiff's pain and suffering. In fact there is not even a suggestion that these two items should be separately assessed. The plaintiff was simply to receive, "such damages as will compensate him for his loss." [23]

The manner in which the plaintiff's damages were pleaded in that case does not appear from the reports, nor was it in any way material since no pleading points were raised. It was accepted that the plaintiff had suffered "pecuniary loss" and the evidence and argument were addressed to that. It can be maintained, however, that "pecuniary loss" should be regarded as special damage since it cannot, strictly speaking, be presumed to flow from the mere fact of injury. For a man to suffer pecuniary loss as a result of personal injury he must have been gainfully employed and such loss therefore flows from the special—though not unusual—circumstances of the case.[24] Loss of earning capacity, on the other hand, can be presumed to flow from personal injury, and should therefore be classified as general damage. The difference between the two affects the way in which the case must be pleaded and also the mode of assessment of the sum to be awarded. It does not affect the rule of the substantive law that in an action for personal injuries a man can recover not only for his pain and suffering and the like, but also for the effect the injury has upon his power to earn his living. If, for example, a young child is injured, he will have suffered no pecuniary loss, but it cannot be doubted that, if he is left with a permanent disability, he can recover for loss of earning capacity.[25]

21 (1879) 4 Q.B.D. 406; (1879) 5 Q.B.D. 78; (1879) 5 C.P.D. 280.
22 See, *e.g.*, *per* Bramwell L.J. (1879) 5 C.P.D. at p. 287.
23 *Per* Brett L.J. (1879) 5 C.P.D. at p. 289.
24 For examples of cases where the pecuniary loss was assessed with great attention to detail, see *Phillips* v. *L. & S.W.Ry.*, *ubi supra*, and *Billingham* v. *Hughes* [1949] 1 K.B. 643.
25 Cases in authenticated reports are not easy to find, presumably because the point is obvious. But see *Jones* v. *Richards* [1955] 1 W.L.R. 444, 458 and the unreported case of *Horne* v. *Harding* [1953] cited Kemp & Kemp, *Quantum of Damages in Personal Injury Claims*, p. 158.

In the typical case of a man injured and so prevented from continuing with his existing employment, however, the modern practice is to distinguish sharply between past and future losses. Past losses are pleaded with great particularity—" £x per week for so many weeks "—and these " special damages " are commonly agreed by the defendant before the trial. Whether they are agreed or not the trial judge almost invariably divides his award of damages between the " general " and the " special," the division being that explained by Lord Goddard in *Gourley's* case.[26]

This development has led to the consequence that actual loss of wages is commonly regarded as an item of damage capable of an independent existence of its own, whereas the true position, it is submitted, is that " loss of wages " is no more than a slightly inaccurate way of describing pecuniary loss. Pecuniary loss, as has been suggested, is special damage and therefore, if a plaintiff fails to prove that special damage he can fall back on his general damage—loss of earning capacity. It does not follow that he can, so far as material, recover no damage at all.

" Loss of Wages "

If this had been realised in *Receiver for Metropolitan Police District* v. *Croydon Corporation* [27] the result in that case might have been different and the need for a change in the law, which Morris L.J. thought might be required,[28] would have been avoided. The defendants in that case had negligently caused an injury to a police constable, with the result that the constable had been incapacitated for seven months, and they had settled the constable's claim by the payment of damages. By statute, however, the plaintiff was obliged to continue payment of constables' wages even though they were unable to work for a period of time, and accordingly the constable neither claimed nor received damages for " loss of wages." The plaintiff argued that he was entitled to recover from the defendants a sum equivalent to that paid to the constable during his incapacity. By his continued payment of the constable's wages the plaintiff had reduced the defendants' liability to the constable and the defendants had thus been unjustifiably enriched at the plaintiff's expense.[29] This argument was rejected by the Court of Appeal,

[26] [1956] A.C. 185, 206. See *ante*, p. 217. For a case where these " special " damages could not be precisely calculated see *Rouse* v. *Port of London Authority* [1953] 2 Lloyd's Rep. 179.

[27] [1957] 2 Q.B. 154.

[28] *Ibid.* at p. 166.

[29] The plaintiff could not rely upon the action *per quod servitium amisit* in view of *Att.-Gen. for New South Wales* v. *Perpetual Trustee Co.* [1955] A.C. 457 and *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 Q.B. 641. Moreover, the constable was in no sense a servant of the plaintiff.

principally on the ground that the defendants' liability had not in truth been reduced. Their liability was to pay the constable what he had lost, and this they had done. He had not lost his wages and therefore there could be no question of the defendants' being liable for them.

This conclusion, it is submitted, was only reached because "loss of wages" was treated as an independent item of damage with an existence of its own, distinct from all other items of damage. It is true that if the constable had claimed his loss of wages as an item of special damage he would have failed to prove his loss, but, on principle, he could then have fallen back on his general damage and claimed for loss of earning capacity for the seven months he was unable to work. It was undeniable that his injury had deprived him of his earning capacity for seven months, and the question would then have been what value to put upon his loss. The answer, in the circumstances of the case, would have been nil, because the constable continued to receive his wages despite his incapacity, and he would therefore have recovered no more from the defendants than he actually did. It would, however, have been apparent that the defendants' liability to the constable had been reduced by reason of the plaintiff's continued payment of the wages. It was not true that (so far as material) the constable had lost nothing.[30] What was true was that the defendants had had to pay nothing as compensation for what he had lost, because of the payment by the plaintiff. The defendants had thus been unjustly enriched at the plaintiff's expense, and his claim in quasi-contract should have succeeded.[31]

"Expenses"

In the recent case of *Schneider* v. *Eisovitch* [32] the plaintiff recovered, as part of her special damages, expenses incurred by a Mr. and Mrs. Taylor in rendering certain services to the plaintiff consequent upon her injury by the defendant's negligence. The plaintiff was under no legal liability to reimburse the Taylors, and for this reason, in the later case of *Gage* v. *King* [33] Diplock J. expressed the view that *Schneider* v. *Eisovitch* had been wrongly decided. Both these cases are noted elsewhere in this Journal [34] and it is not proposed to reopen here the precise question raised, namely whether the plaintiff was indeed entitled to recover the

30 See *Dennis* v. *L.P.T.B.* [1948] 1 All E.R. 779.
31 See *Brook's Wharf & Bull's Wharf* v. *Goodman* [1937] 1 K.B. 534; *Whitham* v. *Bullock* [1939] 2 K.B. 81.
32 [1960] 2 W.L.R. 169.
33 [1960] 3 W.L.R. 460.
34 *Ante*, p. 156.

Taylors' expenses as part of her special damage. It is suggested, however, that even if Diplock J. was right in holding that legal liability to pay is the criterion for the recovery of particular expenses as special damages it does not follow that, if there is no such liability, the plaintiff can recover nothing. If the claim for special damages fails, the plaintiff can fall back on his claim for general damages, and if the injury he suffered was such that the need for services could be presumed, general damages can be awarded.

This, in fact, was the course taken by the Court of Appeal in *Roach* v. *Yates*.[35] One of the consequences of the very severe injuries suffered by the plaintiff in that case was that he needed constant attendance, and this was provided by his wife and his sister-in-law. Greer L.J. dealt with the matter in this way[36]: "The injuries which this man suffered were injuries to the brain which make it necessary that he should have day and night the services of some nurse or friend to look after him. He can get those services, and perhaps get them better than in any other way, from the attendance which is being given to him by his wife and his sister-in-law; *but he would naturally feel that he ought to compensate them* for what they have lost by giving up the work at which they were earning the sum of £3 a week. . . . What will the cost of nursing him . . . come to? It is difficult to estimate the sum, but I am inclined to take the view that the cost to him of having to compensate his wife and sister-in-law for the loss they would sustain during his life by reason of this accident cannot be underestimated at a sum approaching, at any rate, the figure of £2,000, and I accordingly take that as the expenditure that he will be put to for nursing attendance."

It is evident that Greer L.J. was here dealing with a claim for general damages. The plaintiff had, by the date of the trial, incurred neither actual expense nor liability in respect of nursing services, and the words italicised above show that Greer L.J. was not thinking in terms even of a future legal obligation. He was simply concerned to quantify an element in the plaintiff's general damage—his need for attendance.

Reduced Expectation of Life

The recent case of *Pope* v. *D. Murphy & Son*[37] is also noted elsewhere in this Journal,[38] and it will be recalled that the problem there

[35] [1938] 1 K.B. 256.
[36] *Ibid.* at p. 263.
[37] [1960] 2 W.L.R. 861.
[38] See *ante*, p. 160.

was whether a plaintiff whose expectation of life had been reduced as a result of his injuries could recover damages for the loss of that part of his working life of which his accelerated death would deprive him. This is a difficult problem of substantive law, some aspects of which are considered elsewhere [39] and which will not be reconsidered here. The point for present purposes is simply that the true nature of the problem is obscured by the prevailing idea that "loss of earnings" is in itself a special and distinct item of damage, instead of being merely a specialised form of general damage—loss of earning capacity.

In *Harris v. Brights Asphalt Contractors*,[40] a case which Streatfeild J. refused to follow in *Pope* v. *Murphy*, Slade J. said, "I cannot think it right that I should give damages for loss of earnings for a period during which *ex hypothesi* (the plaintiff) is not alive to earn them," [41] and elsewhere in his judgment he speaks of "imaginary earnings after death." [42] Streatfeild J., on the other hand, referred frequently to the plaintiff's "loss of earning capacity" and said that the question was "over what period of time must his earning capacity be measured?" [43] It would seem, therefore, that Slade J. was thinking in terms of special damage—loss of actual future earnings—while Streatfeild J. was thinking in terms of general damage—loss of earning capacity.[44]

This difference of approach, in itself, may explain the different decisions reached in the two cases.[45] Slade J. could not award damages for the loss of the actual wages the plaintiff would have earned but for his accelerated death, for to do so would have been to award damages for loss caused by his death. With respect, however, he should not have concluded that the period during which the plaintiff would be dead was therefore totally irrelevant to the assessment of damages. There remained the problem—not raised before him—whether or not that period was relevant to the assessment of the general damages for loss of earning capacity.

In *Richards* v. *Highway Ironfounders*,[46] another case in which the plaintiff's expectation of life had been reduced, counsel for the plaintiff was evidently aware of Slade J.'s decision in *Harris'* case, and therefore put the claim in a different way. He claimed damages for the loss by the plaintiff of his prospect of making provision for his dependants. The Court of Appeal rejected this

39 *Ibid.*
40 [1953] 1 Q.B. 617.
41 *Ibid.* at p. 633.
42 *Ibid.* at p. 631.
43 [1960] 2 W.L.R. at p. 863.
44 But on the basis that general damage means damage not capable of exact calculation, then both were thinking in terms of general damage—but different kinds of general damage.
45 See the criticism of *Harris'* case in Kemp & Kemp, *Quantum of Damages in Personal Injury Claims*, p. 91.
46 [1955] 1 W.L.R. 1049.

claim on the ground that the loss, except in so far as it may have affected the plaintiff's " general loss of happiness . . . which is covered by the award given . . . for loss of expectation of life," [47] was a loss suffered not by the plaintiff himself but by his dependants. On this point the Court of Appeal, if it may be said with respect, was obviously correct, but the claim would never have been made in this way had counsel for the plaintiff not conceded that, " the judge having accepted that the expectation of life was X years, the lost earning capacity must be calculated accordingly." [48] By this concession he gave away the real point of the case.

In reaching their conclusion in *Richards*' case the Court of Appeal referred in passing to the decision of Slade J. and expressed the opinion that it was correct, but in *Pope* v. *Murphy* Streatfeild J. held that nevertheless he was not bound by it. He thought that *Richards*' case was on quite a different point and therefore did not operate " as a Court of Appeal confirmation of the judgment of Slade J." [49] This conclusion, it is submitted, is a little doubtful for in truth all three cases were concerned with substantially the same element of damage—that the plaintiff, by reason of the reduction of his expectation of life, would not be able to earn his living for so long as he otherwise would have been—and the proper question in each case was simply how to assess this damage. On the other hand it was only in *Pope* v. *Murphy* that the proper question was raised, and it can therefore be said that Streatfeild J. was justified in treating it more or less as *res integra*. In both the earlier cases, because " loss of earnings " was thought of as something more than the " special " form of the " general " loss of earning capacity, the true point never emerged.

The Danger

These examples, it is submitted, suffice to show the danger of allowing the classification of damage as either special or general to escape from the confines of the rules of pleading. In *Receiver for Metropolitan Police District* v. *Croydon Corporation* the Court of Appeal allowed its conviction that it was concerned exclusively with loss of wages as such, to lead it to a conclusion that Morris L.J., at least, reached with apparent regret. In both *Harris*' case and *Richards*' case the proper question was never discussed and though in the field of " expenses " no harm has yet been done—and *Roach* v. *Yates* shows that it need not be done—a danger

[47] *Ibid.* at p. 1064.
[48] *Ibid.*
[49] [1960] 2 W.L.R. at p. 867.

exists. In *Schneider* v. *Eisovitch* Paull J. laid down certain conditions which must be fulfilled if a plaintiff is to recover, as part of his special damages, the expenses of a third party who renders voluntary services to him. If in a later case those conditions are not fulfilled, it should not be thought that therefore the plaintiff can recover nothing. He has still, probably, suffered the need for the services, and the court must assess the value of that element of his loss in the light of the prevailing circumstances.

There are probably other instances in which the importance currently given to the confused distinction between general and special damage has had repercussions on the substantive law. In particular it is believed that the failure of the House of Lords in *British Transport Commission* v. *Gourley*,[50] and of the Law Reform Committee in its report subsequent to the decision in that case,[51] to discuss the question whether the damages awarded were awarded as compensation for loss of income or for loss of capital is attributable to the fact that the classification of the damages as partly special and partly general concealed the existence of the more fundamental problem. The difficulties of *Gourley's* case have, however, been discussed elsewhere and the subject cannot be reopened here.[52]

The original use of "special damage" to describe the damage which a plaintiff must plead and prove in order to show a cause of action for a wrong not actionable *per se* is, in modern circumstances, of little value and the term is seldom used in that context. Its use to describe damages which are capable of exact calculation is, it is submitted, an aberration. "Special damages" should be reserved for the description of items of the plaintiff's damage which must, if the defendant is to have proper notice of the case he has to meet, be specially pleaded. Even if it is not so reserved, it must still be appreciated that, apart from its original and now outmoded meaning, "special damage" is a term belonging exclusively to the rules of pleading. As such it must not be allowed to create the impression that, if some item of the plaintiff's damage cannot for some reason be recovered as part of his special damage, it follows necessarily as a proposition of the substantive law that nothing (so far as material) can be recovered at all. The rules of pleading may, no doubt, affect the results of individual cases, but they must not be permitted to influence the substantive law. Was it not to that end, amongst others, that we rid ourselves of the forms of action?

50 [1956] A.C. 185.
51 Seventh Report (Effect of Tax Liability on Damages) August, 1958. Cmnd. 501.
52 Jolowicz, "Damages and Income Tax" [1959] C.L.J. 86. See also Tucker, *ibid.*, p. 185.

BOOK REVIEWS

Robert Warden Lee 1868–1958. By Harold G. Hanbury. [Published for the British Academy by Oxford University Press. 1959. 12 pp. 2s. 6d. net.]

Professor Lee was a great Oxford figure, and it is fitting that his obituary should be written by the Vinerian Professor, his colleague, friend, and admirer; but he was known to many in Cambridge and London, including all students of Roman Law and Roman-Dutch Law, and they will read with interest this luminous and warm-hearted account of his life and work. He dominated the field of Roman-Dutch Law for half a century, as Professor in London from 1906, at McGill, and then in Oxford from 1921 till he retired in 1956: and as author of the book used by all students and practitioners. He was admitted an advocate in the Transvaal in 1911, but it was in Ceylon, as a Civil Servant, just after his Oxford First Classes in Mods and Greats, that he first became interested in Roman-Dutch Law. He wrote much on many subjects (including *Drunkenness and Crime*), and his *Elements of Roman Law* is, for many students, the best book of its kind; but the reviewer's generation will remember him most clearly as a grave, dignified and formidable figure at the Society of Public Teachers of Law, pulverising those who dared criticise either the Roman Law Bar Examination or the International Academy of Comparative Law.

P. W. Duff.

Cabinet Government. Third Edition. By Sir Ivor Jennings, K.B.E., Q.C., LITT.D., LL.D., F.B.A., Master of Trinity Hall, Cambridge; Bencher of Gray's Inn. [Cambridge: University Press. 1959. x, 570 and (index) 17 pp. 60s. net.]

Parliament. Second Edition. By Sir Ivor Jennings. [Cambridge: University Press. 1957. xii, 548 and (index) 26 pp. 60s. net.]

New editions of the first two volumes of Sir Ivor Jennings's projected trilogy and *chef d'oeuvre* are always welcome. These masterly commentaries and storehouses of selected precedent are used by everyone who is concerned with our central institutions of Cabinet and Parliament, and this covers constitutional lawyers, political scientists, politicians and students of Government generally. Sir Ivor's qualifications include a legal training (so valuable in selecting relevant evidence and assessing its reliability), experience as teacher, administrator and Constitution-maker, wide reading, unremitting industry, common sense and sound judgment with few unavowed prejudices, and an eminently readable style. If *Cabinet Government* has attracted more attention than *Parliament*,

that may be because no other book except Berriedale Keith's attempts to describe fully the modern Cabinet system, whereas there are many books—though none as good as this for its purpose—dealing with Parliament in various aspects.

The third edition of *Cabinet Government*, published in 1959, is based on material available down to the middle of 1957, and is therefore just able to include the changeover from Eden to Macmillan. Since the second edition there have been published Harold Nicolson's excellent political biography of George V, useful lives of Baldwin and Bonar Law, and the memoirs of Attlee and Viscount Simon. Lord Morrison of Lambeth's *Government and Parliament*, the most instructive first-hand account of Cabinet government at the end of the Second World War, is cited in several places in the text but not included in the Bibliographical Notes. More recently we have had a life of George VI and memoirs by Lord Halifax and Sir Anthony Eden. Mr. Macmillan, on the other hand, doubts whether in the unlikely event of his writing his memoirs he would find a publisher for them.

Sir Ivor, while incorporating the fresh material, has decided to retain the early Victorian precedents, taking the view that " most precedents since 1841 are relevant and most precedents before 1841 are not." Some readers may think that for a mid-twentieth-century book it is rather heavily weighted by Victoriana, but Sir Ivor keeps his historical perspective and has always maintained that nothing dates a book so much as the attempt to be up to date. New material that has become available for the period before the death of George V has led to considerable modification of the long chapter on Constitutional Monarchy, for it is noteworthy that in a book on Cabinet government the Sovereign stands in importance second only to the Prime Minister. Incidentally, Lord Beaverbrook tells us in his *Men and Power* that the decision of Lloyd George and his colleagues in January 1922 not to hold a general election was induced by the intervention of a parrot. The next edition will provide the opportunity for a fascinating contrast between the separate accounts given by Churchill, Neville Chamberlain and Halifax on the choice of Prime Minister in 1940.

On re-reading *Cabinet Government* one comes to appreciate more fully the discussion of peripheral topics, such as the Sovereign's Private Secretary under the heading " Irresponsible Advisers." Arthur Ponsonby's *Henry Ponsonby* may now be supplemented on this topic by Appendix B of Wheeler-Bennett's *King George VI*. With regard to the Cabinet Secretariat, it may be mentioned that the salaries are charged to the Treasury vote. The Clerk to the Privy Council, who formerly doubled the part of Secretary of the Cabinet, is subject to a special oath of secrecy. It has been found appropriate to make the present Secretary of the Cabinet a Privy Councillor. The arrangement whereby one Joint Permanent Secretary to the Treasury is Secretary of the Cabinet

and in charge of civil service personnel, while the other Joint Permanent Secretary concerns himself more specifically with finance, appears to have become established. Once again we pay tribute to the imaginative Appendices. The outline of the English Administrative System has been squeezed out; but the Ministries since 1835—supplemented now by a summary of the causes of changes of Government since that date—remain, as do the invaluable Biographical and Bibliographical Notes. The correspondence on the prerogative of dissolution is still confined to *The Times* of 1913, though it might have included the correspondence arising out of the small Government majorities of 1950–51.

The second edition of *Parliament*—which, though published in 1957, reached our hands at the same time as the companion volume—required alterations of a more substantial kind. The most important addition, of course, relates to the Parliament Act, 1949. There is a new chapter dealing with the public accountability of the Nationalised Industries, and a new section on Statutory Instruments. Among many other alterations and revisions, account is taken of the work of the modern school of psephologists. Readers may be disappointed that Sir Ivor has where practicable retained the illustrative examples from the years 1935–37 instead of replacing them by examples from a more recent period, notably in the chapter " Who Makes the Laws? " and the accompanying Appendix II. Would he really have done this if he had not had so much on his plate? The Appendix on Statistics of Private Bills relates to the even earlier period of 1919–29. The new Appendix on the " Shadow Cabinet," though not without interest, illustrates Sir Ivor's penchant for the Opposition, where, we feel, his heart belongs.

In the next edition the admirable chapter on the House of Lords will be able to review the working of the Life Peerages Act, 1958, and the revised Peers' Standing Orders relating to leave of absence. We have always regretted that there is no chapter on Parliamentary Privilege. Sir Ivor has not, on the whole, cared to spend his time on the analysis of cases, though he has in the past been willing to do so in the fields of local government and Commonwealth constitutional law; but Privilege could be discussed primarily from the point of view of Parliament, for most of the cases have been decided there and the materials are Parliamentary rather than judicial.

O. Hood Phillips.

Judicial Review of Administrative Action. By S. A. de Smith, M.A., PH.D., Professor of Public Law in the University of London. [London: Stevens & Sons, Ltd. 1959. xlvii, 468 and (index) 18 pp. £3 10s. net.]

This is a work of comprehensive scholarship on the law relating to judicial review of administrative action. No comparable book on

this aspect of English law exists. And it is difficult to see why anyone else should now seek to cover the same ground. With the possible exception of Robson's *Justice and Administrative Law* (a very different thesis), I know of no other book on or near this subject which one can imagine will continue to appear indefinitely; but the spirit of the author of this book will surely be heartened in heaven by the appearance of " X on de Smith " being, let us say, the twenty-third edition. (I hope Professor de Smith will, as the law changes, himself put his hand to the first twenty-two.)

I mean no criticism when I say that this book has one self-imposed limitation. It is about " the law " and touches only occasionally on the prophets. We are not told much of what the author thinks of the law. That is another book which perhaps he will write one day. But in limiting himself to the law, he has written something of value not only to lawyers. Students of public administration and political science sometimes seem to regard the law as peculiar, special and even unfortunate. They recognise its great relevance but tend to run away from it and protest an ignorance. This protest will seem hollow now they have this book. For Professor de Smith has the advantage, not shared by all lawyers, of writing with style as well as clarity. I do not wish to pretend that this is an easy book to read. But the difficulty it retains inheres in the subject and is not attributable to the writer. I have turned to this book to answer points arising in practice, to meet questions from graduates and undergraduates in England, and to satisfy critical teachers of law a quarter of the way round the world. I have never yet failed to find what I wanted and am beginning to doubt if I ever shall fail.

To come to a few small points. " The opportunities afforded for parliamentary proceedings on subordinate legislative instruments invariably fall short of those provided for debate on Bills, and for this reason ministerial responsibility cannot be regarded as an adequate substitute for judicial review " (p. 7). I doubt that " invariably." For one reason and another, debate on Bills is often much curtailed and on parts of Bills often non-existent. This is not only because of kangaroos and guillotines but because, even without those devices (or to avoid them), Parliamentary time is restricted. And there are other more cogent reasons for deciding when ministerial responsibility is and when it is not an adequate substitute for judicial review. Again, when Professor de Smith tackles the difficult problem of classification of functions, his argument at one point seems not altogether persuasive. He writes of the distinction between legislative and administrative acts being often identified with the distinction between acts which do and which do not affect the legal rights of members of the public, quoting *Blackpool Corpn.* v. *Locker* [1948] 1 K.B. 349 (pp. 33–34). In that case, Scott L.J. argued that circulars were legislative because they

transferred to local authorities " the Minister's legal power to override the common law rights of individual members of the public, for the purposes defined in the circulars, and limited by their conditions." Professor de Smith goes on to say that one concludes that Circular 9/58 implementing certain recommendations of the Franks Committee is not a legislative instrument because it was not made in pursuance of express statutory authority. The identification of what is legislative with what affects legal rights seems to me to be either tautologous or inaccurate and not to be helpful in distinguishing " legislative " from " adminstrative." There may be statutory authority for a great variety of acts which affect legal rights. An official of a local council may properly enter my premises. His entry is generally called an administrative not a legislative act. Yet it is backed by express statutory authority.

Dealing with " law, fact and discretion " Professor de Smith states that in deciding whether to order demolition of a house once the conditions precedent have been satisfied, a local authority exercises a discretion (p. 61). This does not make clear that once the authority has accepted the existence of these conditions it falls under a statutory *duty* to demolish, and this sometimes causes real difficulties as was shown in *Birch* v. *Wigan Corporation* [1953] 1 Q.B. 136.

In a book of this kind, it is difficult to decide how far cases should be discussed in detail in the text and Professor de Smith has managed with great skill to hit the right balance. His discussion (pp. 189–190) of the most unsatisfactory decision in *Smith* v. *East Elloe R.D.C.* [1956] A.C. 736 perhaps errs on the side of terseness. He says that three of their Lordships (Morton, Reid and Somervell) were of opinion that a challenge based on allegations of bad faith could not be made within the six weeks' period. This does less than justice to Lord Somervell's position for, unlike the other members, he went on to argue that " the victim of mala fides would have his ordinary right of resort to the courts " and that the statute did not take away this right. It cannot therefore be said that a majority of the House of Lords thought that bad faith was unchallengeable in view of the words of the Act. And this may be important in the future.

The insignificance of these mild objections underlines Professor de Smith's achievement. Certainly it is true that he could have written a different book emphasising the social and political aspects of all these problems. But he has written this book instead. It is his and he has made it. And it will stand indefinitely as a work of great importance and insight. It is immeasurably the best book on its subject or any part of it.

J. A. G. Griffith.

Studies in Jurisprudence and Criminal Theory. By JEROME HALL, Distinguished Service Professor of Law, Indiana University. [New York: Oceana Publications Inc. 1958. vi and 300 pp. $6.0.]

THIS book is a collection of twelve of Professor Hall's articles, published elsewhere over a number of years, and three new papers on " Legal Theory and Jurisprudence," " Culture, Comparative Law and Jurisprudence " and " Causation." The book opens with the first of these new papers in which Professor Hall seeks to define levels of legal thought. " Jurisprudence," which is comprised of the maximum generalisation over all positive law, is distinguished from " legal theory " which generalises only over some particular field of positive law. Legal theory, in this analysis, thus lies between jurisprudence and positive law, which consists of " rules," defining the details of particular crimes, torts, etc., and " doctrines " which are the wider propositions, concerning, for example, mistake, insanity, etc. The rules of positive law are further distinguished from their " immediate elucidation " which is the " direct ' low level ' definition and clarification of legal rules and doctrines with which case law is largely concerned." It is a neat and comprehensive scheme; but into which category any particular proposition should fall might well be the subject of dispute—nor would the answer seem to matter very much, except, perhaps, to the writers of books on jurisprudence, legal theory, etc.

Legal positivism is criticised on the ground of its failure to take account of " important facts and values " while " nominalist " jurisprudence is castigated for concentrating on words and ignoring the " ideals embodied in a spontaneously created legal system." Dr. Glanville Williams's definition of a crime is attacked as " inadequate " and contrasted unfavourably with " descriptive " definitions, which, admittedly, tell us more about the general nature of crimes but necessarily lack the comprehensiveness of Dr. Williams's definition.

The second essay is an attack on the " particularism " of prevailing legal philosophies—*i.e.*, natural law (particularly as expounded by Maritain) is criticised for its failure to relate values to facts; American legal realism for its concentration on facts to the exclusion of values; and legal positivism for its attempted restriction to " pure ideas," inhibiting a thorough consideration of value and fact. Professor Hall therefore argues for an " Integrative Jurisprudence " which will give adequate attention to ideas, facts and values, though in the absence of " an ontology which is adequate, from an integrative viewpoint " and of the " apt terminology," the invention of which is part of his programme, he finds it possible only to state " certain tentative conclusions " which did not make it at all clear to this reviewer (possibly through his own inadequacy) how this ambitious aim was to be achieved.

An interesting paper on " Plato's Legal Philosophy " is followed by an argument for the " Unification of Political and Legal Theory." A discussion of " Authority " examines the various interpretations which have been put upon that term and its legal meanings, and searches for common features in these various usages. The second new paper, " Culture, Comparative Law and Jurisprudence," is based on lectures given in Korea in 1954 and examines the alleged absence of any distinctive modern Eastern jurisprudence. Kelsen, apparently, prevails in Korea. This leads Professor Hall to inquire why, in some societies but not in others, efforts to solve serious social problems find expression largely in legal institutions and legal thought. He finds the solution, for Korea, in certain social and cultural facts there existing and proceeds to suggest seven hypotheses relevant to the development of jurisprudence generally. This piece of comparative jurisprudence emphasises the importance of probing beyond formal legal differences to social practices, and of the communication of basic legal conceptions. The latter problem is the occasion for a criticism of Professor Hart's inaugural lecture.

Two papers on American jurisprudence and one on " Legal Classification " bring us to the essay on " Causation." Professor Hall is particularly concerned with the neglected criminal aspects of this subject. He rightly points out that the problems are fewer and simpler in crime than in tort because of the doctrine of *mens rea* and of the precise definition of the harms which are relevant for the criminal law. His proposition that cause, as providing a motive or incentive, is the basis of the liability of an accessory before the fact seems open to question, at least as far as English law is concerned. Proof that the incitement had an effect on the principal's mind seems never to have been required for the conviction of an accessory. There is a valuable discussion of intervening cause. The view that *sine qua non* is an essential aspect of the principle of causation is difficult to reconcile with the opinion that simultaneous fatal woundings are both causes—and Professor Hall's attempt is hardly convincing. Under the heading " Causation by Motivation," it is suggested that causation by giving a motive for another person's action had been unduly restricted in the past; and, since an attempt to rob gives a motive for resistance, it is argued that the killing of an innocent bystander or an accomplice by those resisting robbery may properly be said to have been caused by the felon. This is an interesting discussion of a problem which does not seem yet to have arisen on this side of the Atlantic. The second part of this essay discusses the theory of Hart and Honoré, taking them to task for omitting to consider policy and criticising their distinction between " explanatory " and " attributive " inquiry as inapt and misleading.

The five remaining essays are concerned with the criminal law. They include " Science and Reform in Criminal Law " in which

Professor Hall emphasises the importance of the analysis and systematisation of the criminal law as a prerequisite to its improvement and codification. His own analysis of law into principles, rules and doctrines applies most easily to the criminal law and he discusses some of the problems related to legality, punishment and harm, of the seven principles which, he suggests, represent the common ideas permeating the law of crimes. The theme that the criminal law must be systematised is pursued in the next essay on " Revision of Criminal Law." Here Professor Hall continues his campaign for a universal requirement of *mens rea* in crimes; but not everyone will be able to accept his view that punishment of inadvertent adults has no proper place in modern criminal liability, while negligence on the roads can cause the harm it does; nor would the use of " the numerous instrumentalities now available in non-penal law " seem wholly to provide a solution. The final paper, on " Psychiatry and Criminal Responsibility," replies to those " extremist psychiatrists who are dogmatic and aggressive in their attacks on the law of criminal responsibility." Professor Hall rightly regards the criminal law as based on a view of human nature that asserts the reality of free choice, and punishment is a corollary of this. The psychiatrists' special knowledge must be carefully selected and fitted into the framework of the concepts of responsibility and the rule of law. The M'Naghten Rules are defended against psychiatrist critics and the American *Durham* case is criticised for its vagueness, the burden it imposes on the jury and for ignoring cognition. Professor Hall sets out his own proposed substitute for the M'Naghten Rules; but whether these would effect the changes he aims at would seem doubtful: *e.g.*, the substitution of " understand " and " realise " for " know " seems too subtle.

Professor Hall's style does not make for easy reading and his terminology is frequently forbidding. In such a collection of essays there is necessarily some repetition; but many interesting ideas are explored here and it is most convenient to have these writings of an eminent jurist collected in a single volume from the wide range of publications in which they originally appeared.

J. C. Smith.

Some Problems of Proof. By Professor Edmund Morris Morgan. [Columbia University Press. London: Cumberlege. 1956. x and 207 pp. 28s. net.]

This book contains the six Carpentier Lectures delivered in 1955. They contain acute and practical criticism of rules of pleading and evidence. The first lecture comprises an account of the evolution of the common law system of pleading, and an appraisal of the Federal Rules of Civil Procedure. In the second lecture, on judicial notice, the author joins issue with Wigmore, who regarded matters

judicially noticed as disputable, on the analogy of presumptions. Morgan's view that they are indisputable is in accord with that of modern English writers: see Nokes in (1958) 74 L.Q.R. 59.

Another instance of consonance between English and American views is provided in the third lecture, devoted to the respective functions of judge and jury. The problem arises where the admissibility of evidence depends upon proof of a preliminary fact, for example, that a confession was not procured by an improper inducement. The author states that the truth or untruth of the confession is immaterial in determining the preliminary question (p. 104). This is contrary to the decision of the Court of Criminal Appeal in *Hammond* (1941) 28 Cr.App.R. 84, but in complete agreement with the view of Rupert Cross in [1960] Crim.L.R. 385. Again, the Massachusetts heresy that even though the judge has ruled a confession to be admissible, the accused has a second chance to try to convince the jury that there was an inducement, is disapproved by Morgan (p. 103), and by Rupert Cross (*supra*), though for different reasons, criticising the Court of Criminal Appeal decision in *Bass* [1953] 1 Q.B. 680. When academic opinion on both sides of the Atlantic speaks with one voice, it is particularly desirable that courts should seriously consider conforming to it.

The last three lectures are on the hearsay rule. The author concludes that the origin of the rule had nothing to do with distrust of the jury, though this was seized upon to justify it by the House of Lords, to reinforce arguments based upon the absence of oath and of cross-examination (pp. 115–116). Morgan acknowledges the seriousness of the absence of cross-examination in testing the sincerity, observation, memory and language of the declarant, but makes the point that exceptions to the rule such as those of *res gesta* and dying declarations allow statements neither on oath nor subject to cross-examination, while other exclusionary rules exclude former testimony protected by both these safeguards (p. 166). Thus there is no abiding rationale behind the rule and its exceptions.

The author illustrates the confusion from six situations (pp. 130–138). Some of these are manifestations of the rule, others of exceptions, and the distinction is not kept clear. The result is that the summary (p. 138) is lacking in clarity. In particular, we are told that "in none of them (*i.e.*, the situations), is any circumstance of the utterance by a nonparty treated as a reason for not requiring opportunity for cross-examination." This is obscure, when it is remembered that one of the situations treated is that of *res gesta*. In the last lecture, the author returns to these six situations, but treats them in a different order. This lack of attention to system makes the book more difficult to read, and one that could hardly be recommended to a beginner. The six situations are now consolidated together in one hypothetical court case,

to illustrate the absurdity produced when the rules operate concurrently (pp. 172–186). This is impressively done.

The author's view that conduct can be objectionable hearsay is welcome (p. 143). He also adopts the view that the test of hearsay is whether it is to prove the truth of the statement (p. 162). He is particularly severe on the *res gesta* and dying declaration exceptions (pp. 163–166, 181), and on the rule against self-corroboration, (p. 130), which was discarded in the Indian Evidence Act long ago.

His general conclusion, foreshadowed in an earlier lecture (p. 104, and p. 167) is that all hearsay having appreciable probative value should be admitted. He mentions that to some extent the law of evidence has been repealed by the ignorance of the Bar (p. 194). He clearly considers this a blissful state, much to be desired, but such a drastic remedy, allowing that we suffer from a system excessively rigid, could lead to undue flexibility.

R. N. Gooderson.

The Law of Torts. Second Edition. By Harry Street, ll.m., ph.d., Solicitor, Professor of Public Law and Common Law in the University of Manchester. [London: Butterworth & Co. (Publishers), Ltd. 1959. lxxxvii, 500 and (index) 45 pp. 55s. net.]

General Principles of the Law of Torts. By Philip S. James, m.a., of the Inner Temple, Barrister-at-Law; Professor of Law in the University of Leeds. [London: Butterworth & Co. (Publishers), Ltd. 1959. xcviii, 364 and (index) 21 pp. 32s. 6d. net.]

The general arrangement of *Street* which places discussion of particular torts before discussion of the " general part " of the law is by now well known, and this reviewer would endorse the judgment of Dr. Glanville Williams in his review of the first edition ([1956] C.L.J. 251) that, " Here for the first time in England, we have a major textbook of the law of tort which is arranged in the right teaching order." Professor Street is, moreover, to be congratulated for refusing to provide yet another definition of tort and for concentrating rather on the function and purpose of the law.

Whether one order is better than another is a matter of opinion, but some order there inevitably must be, and this obviously requires division of the subject-matter. Traditionally the division is achieved by emphasis on the character of the defendant's conduct, but *Street* prefers instead to emphasise the interest of the plaintiff which is protected. Though this emphasis occasionally produces awkwardness (can " Interference with Judicial Process " be classified as an interest? (p. 6)) it has one advantage in particular. It tends to raise in the reader's mind the question, " Does the law

provide a remedy in the circumstances? " and not the much less important question, " Does this particular tort meet the plaintiff's case? "

The idea that the latter question is the only one seems to be common, and this must, in part at least, be the result of the inevitable division of the law into various headings. When an undergraduate writes that the plaintiff has a better chance in negligence than in trespass and that therefore he should sue in negligence and not trespass, it is difficult to avoid the conclusion that he believes that the plaintiff must choose his tort, and that if he chooses wrongly then his action will fail. Yet, pleading points apart, nothing could be further from the truth. It is only if there is no principle under which the plaintiff is entitled to succeed that judgment will be for the defendant. By approaching the law from the point of view of the plaintiff rather than the defendant *Street* does much to correct the mistaken ideas that division of the subject-matter tends to create.

It is unfortunate, therefore, that, having chosen an approach which leads readily to the appreciation of the law as a whole, so much of Street's detailed writing seems to lead the reader in the opposite direction. He is told, for example, that, " it is possible that trespass has one advantage over negligence where negligent conduct is concerned. . . ." (p. 12); that, " where the plaintiff has the choice (between detinue and conversion) it may be wiser to sue in conversion if the goods have declined in value since the cause of action arose. . . ." (p. 58); that ". . . it may therefore be advantageous to sue for this tort (breach of statutory duty) rather than for negligence " (p. 283, n. 1). Would it not be better to avoid such comments altogether, or at least to make it clear that no question arises—save in exceptional cases—of the plaintiff having to make a final and irrevocable choice between two torts? It may grieve the purist that a judge does not clearly state whether his judgment for the plaintiff is based upon *Rylands* v. *Fletcher* or upon nuisance, but if the judge is satisfied, and for valid reasons, that the plaintiff is entitled to succeed, and if he gives those reasons clearly, it matters not whether the case falls within this compartment of the law or that. In any case it may well fall within both.

It may be that the other well-known books have an even greater tendency to encourage fragmentary thinking, but there are other reasons why *Salmond* or *Winfield* must still be preferred for the student who will only use one book on tort. The practitioner may be satisfied with short statements of the law coupled with an abundance of references, but the student needs discussion and explanation of the principles as well. *Street* raises many questions, particularly in footnotes, and the whole book makes the reader's mind work. It is but rarely, however, that one is able to see the working of the author's own mind. One only sees—and this clearly

—that it has worked. Put shortly, the word " therefore " is too little used. This is particularly unfortunate in those passages where controversial or surprising topics are discussed. Thus, to take two well-known points by way of example, all that is said of *Baker* v. *Snell* (surely a surprising decision even though followed in *Behrens* v. *Bertram Mills Circus*?) is, " So strict is this liability that it is no defence that the act of a third party caused the harm " (p. 269). Again the famous " upon " in Lord Tenterden's Act gets no more than " [*sic*] " and the reader is left to work out the meaning of the section for himself. There are, moreover, obscurities of language (and even the not infrequent misuse of " deemed " (*e.g.*, p. 215)) which make the book difficult to read.

That *Street* cannot, in this reviewer's opinion, be regarded as a substitute for one of the longer-established students' books should not be taken as implying that the book is not of value to the student. (Now that five years have elapsed since the first edition it can go without saying that it is of immense value to the teacher and practitioner.) No ambitious student should rely on one book on tort alone, and *Street* provides an admirable companion to either *Salmond* or *Winfield*. Not only does it provoke thought, but there is much to be found in this book which cannot be found elsewhere. The discussion of the Occupiers' Liability Act, 1957, is probably the best in any book yet published, and the same is true of much of the detailed description of negligence and of breach of statutory duty. The style of the book, moreover, while detracting from its readability contributes to its use as a companion to one of the others. Having got the general picture elsewhere the student can confidently turn to *Street* to take him on, to challenge his preconceived ideas and, and here perhaps is one of the book's great merits, to drive him to the Reports instead of letting him remain content with a textbook writer's views.

If it be a merit of *Street* that the reader is sent to the Reports, it must be counted as a demerit of *James* that the reader is tempted to remain in his chair. Having originally intended to edit *Underhill*, Professor James, as he says in his Preface, found that he had fallen out of love with that work, largely on account of its " Article " system, and instead he has rewritten the work on new lines. The result is a lucid and simple, as well as elementary, account of the law. The order is the same as that of the old Underhill and each section has its " Illustrations," that is brief accounts of one or more decisions. There are 138 illustrations, and an appreciably larger number of cases are digested, these digests being so well done that the student may be content to look no further. Moreover any tendency to laziness is encouraged by the advice—given, it is true, only to the " less aspiring student "—to ignore the footnote references.

Professor James has thus provided an elementary textbook of

the law of tort. He has eschewed reference to non-English authorities and to legal periodicals and has, in fact, kept his matter as simple as possible. Whereas, in this reviewer's opinion, a student new to the law would have great difficulty with *Street* unless he received a good deal of help from other sources, he could read *James* without trouble. But the book's very simplicity means that the law is presented in such a way as to suggest that it is both more settled and more easily understood than is really the case. If *Street* cannot be used alone because it is too difficult, *James* cannot be used alone—save by the most easily satisfied student—because it is, on the whole, too easy.

One is bound to ask, therefore, what is the place of *James* in the law student's library? The answer, though it may not be the answer intended by Professor James, seems to be that it provides an admirable introduction to the subject which should be read through before a fuller study is undertaken. In discussing the order in which the various topics are arranged Professor James says (p. viii) that the order does not matter very much. " Whether, for instance, one treats of ' Particular Torts ' first and ' Vicarious Liability ' after or vice versa seems little more than a thing of aesthetic preference; for it is a matter of chicken and eggs, since the beginner who knows nought of either has to know both before he is enlightened." The claim that the order of topics is unimportant may be contested, but what is undoubtedly true is that the exposition of any one topic must either assume some knowledge of the others or must make constant reference to later parts of the book. (There is a notable example at p. 47, where, when dealing with the survival of rights of action upon death, the reader is recommended to read at once the section dealing with the Fatal Accidents Acts which appears almost at the end of the book.) It is desirable, therefore, that the student should have some general idea of the whole body of the law before he gets down to the serious study of its several parts. This general idea *James* is well constituted to provide.

J. A. Jolowicz.

The Law of Defamation. By Richard O'Sullivan, Q.C. and Roland Brown. [London: Sweet & Maxwell Ltd. 1958. xvi and 152 and (appendix and index) 33 pp. £1 5s. net.]

The law of defamation, like most other branches of the law, requires for its exposition three main things. Its constituent principles and rules must be stated, those which are complex or difficult to understand must be explained and its controversial topics together with its underlying theories and assumptions must be discussed. Differences of opinion may exist with regard to the relative importance of these matters, and in a book intended for practitioners the

first may readily be conceded to be the most important. The book under review, however, is, " designed to provide a general outline of the subject and primarily as a text-book for students," (p. v) and it is a matter of regret, therefore, that it concentrates to the almost complete exclusion of everything else upon bare statements of particular rules. Even the first chapter, on the definition of defamation, consists of little more than the statement, in two pages, of various formulae, and then proceeds to the difference between libel and slander. This may be adequate in a practitioner's book, where what is wanted is primarily a source of references, but it is not enough for the student, even if it is taken together with the next chapter—" What is Defamatory? "—for this consists largely of specific instances. Should not a student's book contain at least a brief discussion of the purpose and function of this branch of the law by which he can test the validity of the various formulae proposed in the cases?

This book, then contains little of either explanation or comment, but it should not, perhaps, be criticised for what it does not contain. The authors, who are the editors of the fourth edition of *Gatley*, acknowledge their indebtedness to that work, and the impression given by the book is that, by and large, it is a potted version of the larger work. To this is added, as an appendix, the principal relevant legislation. As such it is useful, for it provides a handy and reasonably priced reference book and, in view of its parentage, its accuracy can, no doubt, in general be relied on. Unfortunately, however, the process of abbreviation and reduction has not always allowed clarity to be retained. Thus, for example, *Gatley* (4th ed. p. 56) says, " Words which do not definitely charge a crime, but impute a mere suspicion that the plaintiff has committed a crime, are not actionable without proof of special damage." The book under review (p. 22) says simply, " A mere suspicion that the plaintiff committed a crime is not actionable without proof of special damage," which is meaningless. With regard to the qualified privilege of reports of judicial proceedings we are told (p. 97): " The proceedings of each day of a continuing trial may be reported separately. Otherwise, if after the trial the publishers were to pick out and publish an accurate report of a particular portion of the proceeds (*sic*) to the detriment of one of the parties, such a course would lay them open to the imputation that they had adopted a partial publication as an instrument of malice." Reference to *Gatley* (p. 305) shows that here two distinct points have been run together so as to make nonsense. " Otherwise " relates not to what actually follows it in the text, but to, " . . . the ridiculous result would follow that, where the trial of a case of the greatest possible public interest lasted fifty days, no report could be published until the case was ended." This, in its turn, should be followed by " On the other hand, if after the trial. . . ." Finally, to take one

more example, we are told (pp. 133–134) that it is evidence of malice, "if the defendant chooses unnecessarily to issue a defamatory statement to the public press beyond the exigency of the occasion, or to send a defamatory communication by telegram or postcard in lieu of a closed letter." But, as *Gatley* (pp. 251–252) makes clear, the point here is not that malice defeats the defence of privilege. The privilege itself is avoided because there is publication to unprivileged persons.

Unfortunately, therefore, this short account of the law of defamation cannot be regarded as wholly satisfactory as an introduction for students. Used as a source book by those who cannot afford to own the larger work but who are prepared to refer to it and to the cases, the book under review should help to fill a gap. But there is still room for a general introduction to this branch of the law which will provide a readable and critical commentary as well as an unadorned statement of the rules of the law as it is.

J. A. Jolowicz.

Limitation of Actions. By Michael Franks, m.a., of Gray's Inn, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1959. lix, 311 and (index) 11 pp. £3 3s. net.]

Although at least one learned author triumphantly achieved the feat of making a popular murder story depend essentially on a point of the law of limitation of actions, probably few have toyed with the idea of writing a monograph on that subject, which, in the words of the Preface to the book under review, "presents a jungle of detailed rules and exceptions." Indeed, in the last twenty years *Preston & Newsom* has ruled unchallenged in this field. There is thus all the more reason to welcome Mr. Franks's courage and industry in tackling a topic which covers the whole field of law and in producing a volume in which alternative views may be sought on unsettled points.

The book consists of five Parts and two Appendices. There are no numbered Chapters, but each Part is appropriately subdivided by clear headings with corresponding changes in the running titles at the page-tops. Part I (pp. 1–39), "Introduction," systematically covers the policy and construction of the Limitation Act, 1939, and the various factors relevant to its application, such as the time of accrual of the cause of action, the limitation period, the running of time and how it may be stopped. Part II (pp. 43–198), "The Limitation Rules," forms the bulk of the book and discusses the application of those rules to particular types of action. Contrary to what one might expect, these types of action are discussed in alphabetical order instead of being grouped according to similarity of subject-matter. So the reader progresses from Account to Administration of Estates, Admiralty, Advowsons and Arbitration,

from Easements to Foreshore, Incorporeal Hereditaments, Judgments and Land. Some main topics are further subdivided alphabetically—*e.g.*, Contract is split into Bailment, Banking, Breaches of Promise, Carriage and even Solicitors, but Conversion has escaped from the main heading of Torts (pp. 190–198) and found a place of its own (pp. 104–108). One instinctively doubts a purely alphabetical arrangement, but the book is, of course, intended for reference rather than consecutive reading, so that the reader's first resort is likely to be to the index anyway. Sometimes, too, the alphabetical arrangement more or less juxtaposes allied topics such as Land, Landlord and Tenant, Mortgages, Principal Sums Secured on Property, Registered Land and Rentcharges, with only brief intrusions by headings such as Penalties, Quasi-Contract or Recognisances.

Part III (pp. 201–209), " General Extensions and Exceptions," deals with Fraud, Mistake, Disability, Acknowledgment and Part Payment. The sections on Fraud and Mistake tend to be terse and somewhat cryptic: here and in certain other places the reader's task might be eased by expansion of the text at the expense of some of the compressed but nevertheless lengthy footnotes. Part IV (pp. 233–262), " Limitation in Equity," analyses the doctrines of laches and acquiescence, and the application of the statute by analogy. Part V (pp. 265–272), " Pleading and Practice," discusses such matters as the need to plead the statute expressly and the defendant's ability to strike out a statement of claim disclosing an apparently statute-barred cause of action. The Appendices (pp. 275–311) set out the texts of the Limitation Act, 1939, the Law Reform (Limitation of Actions, etc.) Act, 1954, and the Limitation (Enemies and War Prisoners) Act, 1945, with a note upon the last.

Some points of detail have been noted. Should not section 12 of the Sale of Goods Act, 1893, rather than the analogy with land, be cited in support of the proposition that the liability of a seller of goods on his covenant for title arises either on the making of the contract or on the passing of the property to the buyer (p. 102, n. 93)? The discussion of Conversion commences (p. 104) with a remarkable reference to " conversion, and its constituent parts trover and detinue "—and detinue is only once again mentioned in the text (p. 106, line 1). The acquisition of easements by implied grant is said to be one of two examples of positive prescription, the other example being acquisition under the Prescription Act, 1832 (p. 110): thus implied and presumed grants are confused and prescription at common law and by lost modern grant are omitted. The unhappy distinction is made on page 117 between the " legal possession " of the true owner of land and the " actual possession " of his agents, guests or servants who may be in occupation of it. And page 138 suggests that since a tenant's lease is " land " within the meaning of the Act of 1939 a stranger can acquire a possessory title to it *after* the term has determined.

On more general matters, the book is quite remarkably free from misprints, though the reference in note 94 on page 102 should be to page 95, not page 45, and the exciting " Specialities " advertised in the table of contents (p. viii) turned out to be the more humdrum " specialties " to which one is accustomed. The style is usually clear and simple. In the next edition Mr. Franks could further help his readers in two ways; first, by prefacing his discussion of the effect of particular provisions of the Act of 1939 with a brief account, in the text, of the earlier developments and the position prevailing in 1939 as regards the topic affected, instead of his present tendency to leave the earlier rule to be discovered from a list of case-references in a footnote; secondly, by setting out the text of each main statutory provision as it is discussed, so sparing the reader the irritation and loss of concentration resulting from constant resort to the Appendices. On these points, on its comprehensiveness in referring to limitation provisions of statutes other than the Act of 1939, and in the quality of its paper, *Preston & Newsom* has the advantage. The index here, too, is less complete than might be wished, such titles as Detinue, Easements, Libel, Slander and Title finding no place. But the advantages are not all on one side. *Franks* is naturally more up to date, has an edge of some 16s. in price and contains a table of cases which is even more comprehensive than that of its rival. Last, but not least, it is enlivened by the learned author's readiness to express his own often bold and critical views on doubtful and disputed matters. It is a welcome addition to legal literature.

J. W. A. Thornely.

The Attorney in Eighteenth-Century England. By Robert Robson, Fellow of Trinity College, Cambridge. [Cambridge: University Press. 1959. xii, 154 (appendices) 22 and (index) 4 pp. 25s. net.]

Gentlemen of The Law. By Michael Birks. [London: Stevens & Sons Ltd. 1960. xi, 296, and (index) 8 pp. 25s. net.]

Very little has been written on the history of the legal profession, but within the last year two works have appeared upon the solicitor and his predecessor, the attorney. They differ greatly in scope and character: the one is a doctoral thesis dealing with a single century, the other is designed for a more general reader and sets out to tell the story from its beginning to the present day. There is inevitably some overlap in relation to their common field, the eighteenth century, but much less than might have been the case. This is in part due, as Mr. Birks points out (p. ix), to the fact that the two authors had access to different unpublished material, but it is also due to the fact that Mr. Birks is writing as a lawyer and

(very largely) for lawyers. Dr. Robson's book is a welcome addition to the *Cambridge Studies in Legal History*, but it is primarily an essay in social history. Thus, for example, when Dr. Robson gives us the numbers of attorneys in various years he is clearly more concerned with the total than with the distribution between the various courts (pp. 15, 166, 167); the latter point, on the other hand, particularly interests Mr. Birks as a reflection of the varying fortunes of King's Bench and Common Pleas (pp. 142, 143). This is not a criticism of the one or the other: it merely illustrates the difference of purpose and training.

Dr. Robson's first chapter, on the position before 1700, was necessarily based on secondary sources and is consequently very brief. It is unfortunate that Mr. Birks's work was not available at the time, as the latter's account of the attorney in the seventeenth century would suggest that his position at the end thereof was perhaps not *quite* so low and disreputable as Dr. Robson would have us believe, however readily we may agree that the later eighteenth century saw a very great and significant improvement in the status of this profession as in that of others. Dr. Robson next deals with the attempts at regulation of the profession by Parliament and by the profession itself through the Society of Gentlemen Practisers and, towards the end of the century, the provincial law societies. A certain amount of this material, particularly on the Society of Gentlemen Practisers, has been available already in more attenuated form in *Holdsworth*, and the same is true of the attorney's training—or rather, lack of it—though the greater detail and very careful appraisal are welcome.

But, for one reader at least, it is the remaining two-thirds of the book, from Chapter VI onwards, that is of most interest, for the author is there dealing with the part played by attorneys in the life of the country. He first illustrates from widely different sources how clearly the work of the provincial lawyer reflected the character and problems of his particular locality and the position which he was already attaining therein. He then deals in greater detail with four activities which were common to so many attorneys: the management of estates and what was an almost inevitable result of this, the management of elections; the administration of local government, in which the justices had perforce to rely heavily upon the professional lawyer; and, finally and perhaps most interesting of all, the financial business which mortgaging and the discounting of bills brought to the attorney, but which he was already losing to the country banks. The diaries and correspondence of two lawyers at very different stages in their careers give a vivid picture of the life of an attorney—the one in Cornwall and already a success, the other down from Cumberland to try to make his way in London. It is unfortunate that both come from the very end of the century, but it is perhaps this period that most interests the writer—when the profession was becoming " respectable " and a bulwark to

society, as was the " middle class " generally. As he remarks (p. 146), " Gentleman was now a title to be earned. . . . Gentility had often been obtained in the past through the professions, now it was conferred by them, and enjoyed in them."

Dr. Robson has given us a careful, well-balanced and well-documented account of the attorney in eighteenth-century England. This reviewer has noticed very few errors—as was only to be expected of author and publisher—and most of those fall outside the period under review. A layman, for example, may be forgiven for the statement that " the setting up of a registry of deeds was delayed until 1925 " (p. 48, n. 2) and it is not strictly accurate that the Society of Gentlemen Practisers had been " forgotten " (p. 34) when the present Law Society was founded in 1825. Ignored, perhaps, but not forgotten, as Mr. Birks shows (pp. 158–160). Mr. Birks is surely also right to see in the Rules of 1763 prohibiting attorneys and solicitors from being called to the Bar for two years after they had ceased to practise a reaction to the resolution of the Society of Gentlemen Practisers in 1762 to prosecute barristers transacting business properly belonging to attorneys (p. 196); no such connection is suggested by Dr. Robson (pp. 25–26, 30).

It should be noted that the title is *The Attorney in Eighteenth-Century England*, not simply in the eighteenth century; for one side of the attorney's work which we are not really shown is that of law and litigation. Apart from the account of the Society of Gentlemen Practisers the spotlight is not upon the London attorney but upon the provincial one; and, even then, the account of the work of quarter sessions occupies only a footnote (p. 107) and none of the attorneys seem ever to have been engaged at Assizes. It may be retorted that this side of things formed only a very small part of the average attorney's life—and the value of the book lies in the very fact that it shows us the other aspects of his work—nevertheless it is a side of his life which the legal reader will miss.

It is, however, an aspect of the attorney's work which Mr. Birks is well qualified to supply, for he is an Assistant Registrar of the Chancery Division, and he does tend to dwell on it rather more fully in his very readable history of the " lower " branch of the legal profession. But he contemplates a very different reader, the lawyer and layman rather than the historian, and deliberately eschews footnotes, contenting himself with a short list of his principal sources at the end of each chapter. This is regrettable, because the book contains a great deal of interesting material drawn from a wide variety of sources, published and unpublished. It may not be a very arduous task to track down a reference, but it need not have been a task at all. The absence of adequate references is the more regrettable inasmuch as there are a number of surprisingly elementary errors, which will render the serious student rather

cautious. Thus fines and recoveries would seem to be thought one and the same mode of conveyance (p. 80), while the statement that *Coke on Littleton* and Bacon's *Abridgement* were " both works remarkable enough in their day but extremely difficult to digest and rather out of date by the eighteenth century " (p. 169) would seem to argue a confusion between Francis and Matthew Bacon. One therefore hesitates before such statements as that fraud as well as forgery was a capital offence in the eighteenth century (p. 149) or that the Palace Court at Westminster was one of the exceptional local courts which worked " quite well " (p. 208) (see 31 *Juridical Review* 135).

But errors should not blind one to the very real worth of this book. It deals adequately with the more modern period and is alive to the problems of the earlier period. The author would be the first to acknowledge his great debt to *Holdsworth*, but he also draws vividly on sources which most of his readers would not think of consulting on the subject. The treatment is imaginative, though the style is perhaps excessively " racy " and journalistic—the earlier chapters exhibit an irritating tendency to end almost every paragraph with an exclamation mark. However, the book is enjoyable and the wealth of charming illustrations more than compensate for the occasional misprints.

It is to be hoped that the ordinary lawyer will read both books. He will find much to interest him and much to enjoy.

M. J. Prichard.

The Role of Nationality in International Law. An Outline. By H. F. van Panhuys. [Leyden: A. W. Sijthoff. 1959. 256 pp. Fl. 19.95.]

This book seeks to survey the " traditional role " of nationality as what the conflicts lawyers call a " connecting factor " between man and the law in the international legal system. For this purpose the learned author makes a tour of the horizon, beginning with the " rules governing the treatment of aliens." May one observe parenthetically here that it is a great pity international lawyers persist in speaking of " aliens," who are mere non-subjects at common law, when they mean to refer either to the nationals of other states or to non-nationals? Next Dr. Van Panhuys takes the rules governing the litigation of international claims. Thirdly, and most interestingly, he deals with the rules governing " sanctions " and the laws of war; then with the rules regulating conflicts of criminal jurisdiction; with " treaty law "; and with the restrictions international law imposes upon the competence of states to lay down nationality rules. The contexts within international law in which nationality is relevant are not, of course, exhausted by this list. And, unfortunately, some of the chapters—notably that on

treaties—are very short indeed. Still, a great deal of very interesting material is presented and every student of the subject will be glad to have this book. The second Part of the volume, in which the learned author speculates as to whether the " traditional role " of nationality is changing or should be changed, will command less attention.

CLIVE PARRY.

Aggression and World Order : a Critique of United Nations Theories of Aggression. By JULIUS STONE, S.J.D., D.C.L., Challis Professor of International Law and Jurisprudence, University of Sydney. [London: Stevens & Sons, Ltd. 1958. 217 and (index) 7 pp. 30s. net.]

DURING the months of October and November 1956 there took place the attack by Israel on Egypt, with the consequent Anglo-French intervention, and the quelling of the Hungarian Revolution by the Soviets. At the same time, the Special Committee of the General Assembly of the United Nations on the definition of aggression closed its nineteenth and final meeting with the admission that there was no agreement either on the desirability of defining the concept of " aggression " or upon what the definition should be if it were desirable.

This extraordinary paradox brings to the forefront the subject to which Professor Stone devotes this work. Much effort has been expended over the last thirty years in attempts to define the concept of " aggression," both by successive International Organisations and by many publicists. Although several of the defendants at the Nuremberg Trials in 1946 were convicted of the crime of waging aggressive war, the Tribunal never offered its definition of what that crime is, and all the attempts since then by such bodies as the International Law Commission and the Sixth Committee of the General Assembly have been without result.

Professor Stone sets himself the task of answering two questions. First he asks is any definition of " aggression " feasible? Here he points out that there is nothing impossible about a logical definition whose only use is theoretical, but it is different when an attempt is made to frame a " legal " definition, as he terms it. This is because a " legal " definition has a function to perform in the legal order. Here again, there are at least two distinct uses to which a definition of " aggression " might be put: either for future purposes of imputing criminal responsibility for the commission of the war crime, or in the field of peace enforcement by the international organisations. The author is mainly concerned with the latter sphere of application, and here he shows that none of the definitions so far proffered have been anywhere near satisfactory; they have either been of the enumerative type, such as the Litvinov Proposal of 1933, which he says may result in a signpost to those

who have a culpable intent to point out their way to commit some evil act with impunity, or of the general type, in which case the international organisation concerned will still not be freed from the difficult task of applying the definition in any particular situation, or they have combined these two types, and so have combined their shortcomings. The author, in fact, considers that any attempt is doomed to failure because it is impossible to consider any attack by one state upon another out of the context of its surrounding circumstances.

But, the author asks at this point, does it matter? Realistically he answers in the negative. He is able to show that on those occasions upon which peace-enforcement organs have taken any measures against apparent " aggressors," they have been able to do so without any resort to the notion of aggression. In the League of Nations era the agitation for a definition of aggression first reached a high point; during the five years after the Second World War less was heard of it, and it was not until after 1950 and the Uniting for Peace Resolutions of the United Nations General Assembly that the demand for definition revived in its old vigour. This is not accidental, for under Article 39 of the Charter the Security Council can act in its peace-enforcement capacity by reference to the notion of " a breach of the peace," without reference to " aggression," whereas the powers of the Council of the League and of the General Assembly were, and are, only recommendatory, imposing no legal obligation upon the member states. Therefore, some concept such as " aggression " may be found useful, because of its call to those who resist evil, in rallying states to act upon the recommendations.

The importance of this study is that it does remind us that the first task of any peace-enforcement organ is to take steps to prevent conflagrations from spreading, and to separate combatants, and any debate at such times may not only be useless but positively harmful, in that the organ may be diverted from its main task into lengthy recriminations. If the conflict is stopped there and then, the need for naming either side as the aggressor will tend to lose altogether its cogency.

Professor Stone puts forward his arguments with his usual great learning and persuasiveness; the result is a stimulating and sane study of a problem whose discussion has so often been characterised by sterility and lack of proportion.

JOHN COLLIER.

The Red Cross Conventions. By G. I. A. DRAPER, LL.M., Lecturer in the Faculty of Laws, King's College, London. [London: Stevens & Sons, Ltd. 1958. ix and 115 and (3 appendices) 99 and (index) 12 pp. 35s. net.]

THIS short book is an expanded and revised version of a series of lectures given by the author at King's College, London, in 1957.

Those lectures preceded the enactment of the Geneva Conventions Act by Parliament in 1957 as a necessary preliminary to the ratification by this country of the four Geneva Conventions of 1949.

The author was one of the " handful of determined citizens " (to use his own phrase) who helped by pressure to bring about this legislation after what he stigmatises as the " inexcusable delay " of eight years before British ratification. Here, in the short space of 115 pages, he uses his expert knowledge to give an interesting and sometimes vigorous exposition of the principles and main provisions of the Conventions. These, together with the 1957 Act, are printed as appendices to the text.

But his is not merely a straightforward exposition. In the first chapter, a rather attenuated historical introduction is followed by an investigation of the principles common to all four Conventions. Here the author is probably at his best. He is quite prepared to indulge in controversy, and is frequently highly critical, not only of the provisions themselves (particularly with regard to the enforcement provisions), but also of Governments. He does not permit the United Kingdom Government to rest on the laurels it has earned by ratification.

Chapter 2 is devoted to the Civilians Convention, Chapter 3 to the Prisoners of War Convention, and Chapter 4 to those Conventions dealing with the Wounded, Sick and Shipwrecked. The Conventions are each subjected to critical scrutiny, and the author awards the palm to the P.O.W. Convention as " the most practical and balanced " of all the four. This is the one which has been perhaps most tested in practice, particularly during the Korean Conflict. The author recalls the difficulties which were experienced at the termination of hostilities, with regard to those Chinese and North Korean prisoners who did not wish to be repatriated. This showed the unsatisfactory side of the Article which in each Convention provides that no renunciation may be made by the beneficiaries of their rights under the Conventions. Another result of the war in Korea was to demonstrate, as the author remarks, that certain articles were already obsolete within a year of the signing of the Convention, in that the framers did not envisage that in future troops might be fighting under unified commands. The difficulties of working the enforcement provisions when an international organisation is a party to the conflict are a result of this failure to appreciate this possibility.

The last chapter is devoted to an attempt to assess the contribution of the Conventions to the law of War. He concludes that they mark an advance on the previous position, particularly the new Convention affording protection to Civilians.

Colonel Draper's humanitarian instincts are balanced by a lively critical approach, and by a sense of realism, although one may take leave to doubt that the practice of declaring safety zones before the

outbreak of hostilities will do even the little towards mitigating the horrors of nuclear warfare he envisages.

The main shortcomings of this book arise from the somewhat carelessly executed transition from lecture to book form. The footnotes seem sometimes to have been compiled too hastily, with a resulting loss of accuracy, the citation of contributions to periodicals needs standardising, and some omissions should be made good.

But it may be said that in spite of its brevity, this is an excellent contribution to the literature on the laws of War. Should detailed study of the texts of the Conventions be started in the Law Faculties of this country, as the learned author suggests, this work will form an indispensable introduction.

JOHN COLLIER.

Guide to Foreign Legal Materials: French, German, Swiss. By CHARLES SZLADITS. [Published for the Parker School of Foreign and Comparative Law, Columbia University, New York, by Oceana Publications Inc. N.Y.; Sweet & Maxwell, Ltd., London. 1959. xv and 523 and (indices) 72 pp. 95s. net.]

THE growing interest in the study of foreign and comparative law has stimulated the need for well-informed bibliographies. From the early beginnings by Kaden (1930) and Gutteridge (1945) to the modern books by David (1952), the United Kingdom Committee of Comparative Law (1956) and the Czechoslovak Academy of Sciences (ed. V. Knapp, 1959), to mention only a few of the bibliographies prepared under the auspices of the International Association of Legal Science, the technique has been constantly improved, and the scope has been enlarged. The author of the work under review is already well known as one of the most competent and erudite workers in this field, and his new *Guide to Foreign Legal Materials* is another valuable contribution to this type of literature. The bibliography sets out the legal literature of France, Germany and Switzerland. So far as France is concerned, the same task has been carried out previously by David, both alone and in collaboration with De Vries, though on a more modest scale. For Germany and Switzerland the enterprise is entirely novel, since the bibliography executed by the German Committee of Comparative Law has never seen the light of day and a Swiss bibliography was never contemplated. The plan of the modern bibliographies is slowly becoming more uniform. Bibliographical data concerning legislative materials, case law and doctrinal writings are introduced by systematic comments and are accompanied by descriptions of a substantive character. The author, whose introductions to the sources of French, German and Swiss law are of a high scholarly standard even if it is possible to join issue with him on particular

points, such as the relation of case law to customary law, has benefited from the experience of American writers on the use of legal materials and has provided instructive readings intended to teach how to handle foreign documentation. In addition he offers, wherever possible, introductory comments on the particular branch of law with which he is dealing. The surveys are of a thoroughness which can hardly be surpassed, as the entry on p. 498 shows (a Cambridge Diploma dissertation published in Switzerland).

In view of the literary upheavals in Germany after the Second World War and the absence of a comprehensive guide to Swiss law, the new volume will prove an indispensable tool. In spite of an overwhelming mass of citations, the standard of production is excellent (but see p. 164, n. 155; p. 175, n. 187; p. 199, n. 54a).

K. Lipstein.

Manual of Legal Citations. Part I. The British Isles. Edited by Professor G. D. Nokes. [London: University of London, Institute of Advanced Legal Studies. 1959. ix, 77 and (index) 7 pp. £1 1s. net.]

The Institute of Advanced Legal Studies has always taken the publication of bibliographical aids to be within its province and already has some works in this field to its credit. It has now published the first part of a comprehensive manual of legal citations which will, in due course, cover the abbreviations used in legal writing within and without the British Commonwealth.

Difficulties are met with in using and in identifying abbreviations. The task of both writers and readers can be simplified by uniformity in their use. The main purpose of the book under review is to "encourage uniformity in the citation of legal sources" (Preface) and to help bring it about by practical suggestions. In the many cases where recognised abbreviations exist it is helpful to have them brought together in one place; in other cases a standard practice (with alternatives where suitable) is suggested. Both writers and readers are thus helped.

The manual contains much more than the title indicates. The list of abbreviations with explanations which forms its second part contains a certain amount of bibliographical information. Its first part, the Introduction by Professor Nokes, describes in 38 pages the sources to which the abbreviations refer and suggests the best ways of writing the citations. It will help students to understand better the materials they have to work with and make them aware of the forms in which legal sources are to be found. They will obtain guidance in the use of abbreviations and this should in turn make their written work easier to read and more attractive. The second part of the work will help them to identify abbreviations which they may encounter.

The whole of Ireland is included in the work. This, as Sir David Hughes Parry explains in the Preface, has no political implication and was clearly the right thing to do. The reviewer is looking forward to the publication of the subsequent parts of the manual.

W. A. Steiner.

Wills, Probate and Administration. By B. S. Ker, m.a. (cantab.), Solicitor of the Supreme Court. [London: Sweet & Maxwell, Ltd. 1959. xxiv, 279 and (index) 14 pp. £2 2s. net.]

Mr. Ker states in his Preface that this book grew up around a nucleus of lecture materials and that his object is to present the law of wills and administration in a short digestible form from the viewpoint of the practitioner's desk. Accordingly he has not only stated the law but has offered some suggestions on its application. So he has deliberately chosen to treat the various topics in the order in which a practitioner tends to meet them, rather than in the order an academic lawyer would choose. This latter point is strikingly illustrated by the fact that an executor's liability is considered as early as p. 42, in the third chapter, whereas the methods whereby dissatisfied beneficiaries under the will of the deceased, or his creditors, may seek to enforce that liability is discussed some two hundred and twenty pages later in the penultimate chapter.

This emphasis on practical matters runs throughout the book. The one instance where there is an extensive discussion of the facts and decisions in a number of cases on a single topic concerns a testator's ability to vary the provisions of the Administration of Estates Act, 1925, as to the order of application of assets for the payment of debts (pp. 244–249). Matters of procedure, too, get detailed and extensive treatment: *e.g.*, the methods of proving a will (Chap. 5). Mr. Ker is thus seeking to cover, in fewer pages, a considerably wider field than the two books with which one is instinctively tempted to compare his, namely, Bailey's *Law of Wills* and Parry's *Law of Succession*. The result, inevitably, is that the substantive law tends to suffer by receiving scantier treatment, thus making the book unsuitable for students, who need the substantive law to be not merely stated but also explained and illustrated by cases and examples. Nor is reference made to periodical literature on disputed points. On the other hand practitioners and articled clerks who have already studied the substantive law will no doubt find the book very handy for refreshing their memories on the general principles and for reminding them of the various practical points needing their attention and consideration in the course of drafting wills and administering estates. They will find some useful suggestions and will be heartened by the author's instinctive reaction to any doubtful point of law in suggesting

how to advise a testator to circumvent the difficulty, by contrast with the normal academic reaction of urging a reform of the law by legislation.

A very great deal of information has been squeezed into a modest-sized book and the reader will find something about almost everything connected with wills, probate and administration. The style is generally clear, concise and forthright, and the format attractive. Although the order of treatment of topics was selected mainly for practical reasons, the author has shown considerable ingenuity in bringing various apparently disparate items within a common heading, as in Chapter 12 where, under the heading of "Claimants against the Estate," he brings together dependants under the Inheritance (Family Provision) Act, 1938, as amended, former (divorced) spouses of the deceased claiming under the Matrimonial Causes (Property and Maintenance) Act, 1958, unpaid legatees or other dissatisfied beneficiaries and, finally, creditors.

Nevertheless the admitted fact that it is impossible in a book of this size to cover adequately all the relevant topics leads to various undesirable consequences. Sometimes a difficult point is shrugged off by a footnote referring to a section of a statute or a case—as in note 6 on p. 15 concerning the exception to the ordinary rule (that a will is automatically revoked by the testator's subsequent marriage) where the will exercises a power of appointment over property which could not, in default of appointment, benefit the testator's new family; or again in notes 22 and 24 on p. 195, which tell the reader where he can find out for himself, if he must, the definition of a trust corporation, of which the text refuses to give him any hint. Sometimes an important topic, although of frequent occurrence in practice, is unhelpfully dismissed with little or no explanation—*e.g.*, on pp. 18, 19, the troublesome doctrine of dependent relative revocation is disposed of in less than a page, most of which consists of a statement of the facts and decision in *Re Southerden* [1925] P. 177. Would it not have been helpful to have described the various situations where the doctrine is apt to steal in unobserved, as where a testator revokes or alters a will in the mistaken belief that a later will, or the alteration, is validly executed, or that he thereby revives an even earlier will which had itself been revoked by the will now purportedly revoked? This latter case is indeed discussed in three lines on p. 22 but the doctrine involved is not there mentioned, nor is there any cross-reference between pp. 18 and 22. Similarly on pp. 113, 114, the real effect of section 33 of the Wills Act, 1837, in saving certain gifts from lapse is never made clear since the discussion of *Re Basioli* [1953] Ch. 367 is so terse as to be unintelligible to anyone who does not already know the case; and the two lines on p. 114 devoted to section 32 of the same Act are both inelegant and ambiguous. Sometimes the desire for compression leads to a long and involved sentence, heckled by numerous footnotes, which

compels the reader to stop and unravel it for himself before he can continue to follow the thread of argument—*e.g.*, the first paragraph on p. 42.

More serious, though, are the occasional instances where the law is misstated or so oversimplified as to be dangerously misleading. The clearest example of this, perhaps, is the three-page discussion of the Rule against Perpetuities. On p. 140 the impression is given that the Rule is a " wait-and-see " rule, since it is said that " According to the so-called rule against perpetuities a gift must vest within the period of a life or lives in being and twenty-one years. If it does not it is void." This impression is reinforced on p. 141 by the statement that the relevant question, in determining the validity of a gift under the Rule, is " Can the future gift *possibly* vest in the period ? " (author's italics), whereas, of course, the question is really whether the gift might *possibly* vest *outside* the period. This is followed on p. 142 (after three-quarters of a page on class-gifts with a reference to the class-closing rules at p. 182, but no reference back again) by a confusing discussion of *Proctor* v. *The Bishop of Bath and Wells* (1794) 2 Hy.Bl. 358, which again implies that the Rule is a " wait-and-see " rule. On p. 154 it is stated that the *only* words that sufficed to create an estate tail in a deed before 1926, and so the only words which will suffice to create an entail today under section 130 (1) of the Law of Property Act, 1925, were " To A in tail " and " To A and the heirs of his body ": no reference is made to alternative words of procreation. In discussing the meaning of particular words and phrases commonly used in wills it is stated (p. 180) that " Personal Chattels " are defined by section 55 (1) (*x*) [*sic*] of the Administration of Estates Act, 1925; so they are, but for the purposes of that Act, *i.e.*, on an intestacy, and not necessarily for the purposes of some home-made will. Lastly, a number of grammatical errors and a few misprints creep in here and there, but these will no doubt be eliminated in a further edition in due course.

However, such instances are not numerous and are offset by many good things, such as the pithy but surprisingly comprehensive statement of the rules as to the formalities required for making wills (Chap. 1), the useful summary of the distinctions between an executor and a trustee (pp. 34–36), the admirably clear and concise chapters on proving a will (Chap. 5) and on special grants of representation, resealing and revocation of grants (Chap. 9), and on the incidence of estate duty and debts (Chap. 11). Consequently the book is likely to find its intended place on the desks of many practitioners.

J. W. A. Thornely.

Books also received include the following:

ALEXANDROWICZ, C. H. *A Bibliography of Indian Law.* [O.U.P. 1958. 8s.]

ALLSOP, P. *The Legal Profession.* Fifth edition. [Sweet & Maxwell, Ltd. 1960. 10s. 6d.]

ANDERSON, J. N. D. *Islamic Law in the Modern World.* [Stevens & Sons, Ltd. 1959. 25s.]

BAYITCH, S. A. *Aircraft Mortgage in the Americas.* [University of Miami Press. 1960. $4.75.]

Butterworth's Costs Handbook. Edited by B. P. TREAGUS and H. J. C. RAINBIRD. [Butterworth & Co., Ltd. 1960. 37s. 6d.]

CAIRNCROSS, A. *Introduction to Economics.* Third edition. [Butterworth & Co., Ltd. 1960. 20s.]

CANTERBURY, ARCHBISHOP OF. *A Memorandum on Artificial Insemination by Donor.* [Church Information Office. 1960.]

COOPER, W. E. and BAMFORD, B. R., assisted by MARAIS, R. M. *Handbook on the Criminal Procedure Act and the Criminal Provisions of the Magistrates' Courts Act.* [Capetown. Juta & Co., Ltd. 1959. 45s.]

DAS, S. K. *Japanese Occupation and Ex Post Facto Legislation in Malaya.* [Singapore. The Malayan Law Journal. 1960. £2 5s.]

DE SMITH, S. A. *The Lawyers and the Constitution: An Inaugural Lecture.* [G. Bell & Sons, Ltd. 1960. 3s. 6d.]

DEVLIN, THE HON. SIR PATRICK. *The Enforcement of Morals.* [O.U.P. 1959. 3s. 6d.]

Everyman's United Nations. Sixth edition. [N.Y. United Nations. 1959. $3.50: 25s.]

The Foundation Directory. Edition 1. [N.Y. Russell Sage Foundation. 1960. $10.0.]

GOODHART, A. L. (Editor). *The Migration of the Common Law.* [Stevens & Sons, Ltd. 1960. 5s.]

HANBURY, H. G. *English Courts of Law.* Third edition. [O.U.P. 1960. 8s. 6d.]

HOOD PHILLIPS, O. *A First Book of English Law.* Fourth edition. [Sweet & Maxwell, Ltd. 1960. 21s.]

The Howard Journal. Vol. X, No. 3. [Howard League for Penal Reform. 1960. 3s. 6d.]

JENNINGS, R. Y. *The Progress of International Law: An Inaugural Lecture.* [C.U.P. 1960. 3s. 6d.]

Joseph Story. A Collection of Writings by and about an eminent American Jurist. Edited by M. D. SCHWARTZ and J. C. HOGAN. [N.Y. Oceana Publications, Inc. 1959. $5.00.]

KILMUIR, THE RT. HON. THE VISCOUNT. *The Law of Parliamentary Privilege.* [University of London. The Athlone Press. 1959. 3s. 6d.]

LAUTERPACHT, E. *The Suez Canal Settlement. A Selection of Documents.* [Stevens & Sons, Ltd.: N.Y. Frederick A. Praeger, Inc. 1960. Wrappered 10s.: bound 15s.]

LAUTERPACHT, E. *The United Nations Emergency Force. Basic Documents.* [Stevens & Sons, Ltd.: N.Y. Frederick A. Praeger, Inc. 1960. Wrappered 12s. 6d.: bound 17s. 6d.]

The Law College Magazine. Vol. XXVII, Nos. 1 & 2. [Bombay. Government Law College. 1959. Rs. 4.]

Maasdorp's Institutes of South African Law. Vol. II. The Law of Things. Eighth edition. Edited and revised by C. G. HALL, Q.C. [Capetown. Juta & Co., Ltd. 1960.]

MEGARRY, R. E. and WADE, H. W. R. *The Law of Real Property.* Second edition. [Stevens & Sons, Ltd. 1959. 70s.]

The Oxford Lawyer. Vol. 3, No. 1. [Oxford. Christ Church. 1960. 3s. 6d.]

Readings for Democrats. Edited by E. REED. [N.Y. Oceana Publications, Inc. 1960. Cloth $3.50: paper $1.35.]

Readings for Republicans. Edited by F. L. BURDETTE. [N.Y. Oceana Publications, Inc. 1960. Cloth $3.50: paper $1.35.]

Reports of International Arbitral Awards. Vol. IX. [N.Y. United Nations. 1959. 36s.]

Revista da Faculdade de Direito. Vol. LIV, Fasces I & II. [University of Sao Paulo. 1959.]

RUSSELL-CLARKE, A. D. *Copyright in Industrial Designs.* Third edition. [Sweet & Maxwell, Ltd. 1960. 40s.]

SEYMOUR, S. M. *Native Law in South Africa.* Second edition. [Capetown. Juta & Co., Ltd. 1960. 85s. 6d.]

SIEGHART, P. and WHALLEY, J. B. *Slaughterhouses.* [Sweet & Maxwell, Ltd. 1960. 50s.]

Stephen's Commentaries on the Laws of England. Supplement to the twenty-first edition. [Butterworth & Co., Ltd. 1960. 10s. 6d.]

Stone, J. *Legal Education and Public Responsibility.* [Association of American Law Schools. 1959.]

Surrency, E. C., Feld, B., and Crea, J. *A Guide to Legal Research.* [N.Y. Oceana Publications, Inc. 1959. $4.50.]

Thémis. Revue Juridique. Nos. 33–36. [Montreal University, Faculty of Law. 1959–1960. $3.00 p.a.]

Varia Juris Gentium. Collected by the Editors of the Netherlands International Law Review. [Leyden. A. W. Sijthoff. 1959. Fl. 30.]

Wilk, L. A. *Accounting for Inflation.* [Sweet & Maxwell, Ltd. 1960. 35s.]

Yearbook of the International Law Commission. 1953. Vol. I. Summary Records of the Fifth Session. [N.Y. United Nations. 1959. 28s.]

Yearbook of the International Law Commission. 1959. Vol. I. [N.Y. United Nations. $2.00.]

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